109-268

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 102.

PATRICK G. MEATH, PLAINTIFF IN ERROR,

vs.

THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED OCTOBER 11, 1880.

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1 Pleas and proceedings had and done in the circuit court of the United States for the southern district of Mississippi, at a term thereof, begun and held at the court-room, in the city of Jackson, on the 4th Monday, being the 26th day of January, A. D. 1880, before the honorable Robert A. Hill, district judge, present and presiding.

PATRICK G. MEATH
vs.
THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS. } 2617.

Be it remembered that heretofore, to wit, on the 21st day of December, A. D. 1878, Patrick G. Meath, by his attorneys, filed in the clerk's office of said court his certain declaration, which, with the exhibits thereto, are in words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Mississippi:

In the circuit court of the United States in and for the southern district, at the May term, A. D. 1879.

Patrick G. Meath, a citizen of the State of Tennessee, by his attorney, complains of the Board of Levee Commissioners for the counties
2 of Bolivar, Washington, and Issaquena, a corporation of the State of Mississippi, domiciled in the county of Washington, in said district, now known as the Board of Mississippi Levee Commissioners, defendants, in a plea of covenant broken. For that whereas heretofore, to wit, on the 13th day of August, A. D. 1869, at the district aforesaid, the said defendants, by their president, J. S. Edwards, entered into, executed, and delivered their covenant in writing, under seal, with the plaintiff and one Martin Keary, who was then and up to the day of his death continued to be a citizen of the State of Mississippi, and who, on the day of September, 1878, departed this life intestate, but who, if alive, would not be joined in this suit, because to do so would arrest the jurisdiction of this court, which said covenant is here to the court shown, whereby plaintiff and said Keary covenanted and agreed to construct and finish in the most substantial and workmanlike manner, to the satisfaction and acceptance of the chief engineer of said defendants, all the graduation, piling, and such other work as may be required on sections of levee under the juris-
3 diction and control of defendants, named Skipwiths, Cammack, Christmas, and Gibson's levees, in Issaquena County, in said district, the said work to be finished as directed in the specifications embraced in said covenant, and agreeably to the direction from time to time of the said engineer, on or before the first day of April, 1871. For which said work so to be done and performed the said defendants covenanted and agreed, in and by said covenant, to pay to plaintiff and said Keary, as follows, to wit: Sixty-nine $\frac{3}{4}$ cents per cubic yard for the work done on the Cammack levee, with one-sixth added for shrinkage, making $80\frac{5}{24}$ cents per cubic yard, and for the work done on the Skipwiths, Christmas, and Gibson levees, for seven cents per cubic yard, with one-sixth added for

shrinkage, making 54⅚ cents per cubic yard; and for breaking surface, fifteen dollars per acre; and for heavy grubbing and clearing, one hundred and fifty dollars per acre; and for light grubbing and clearing, forty dollars per acre. The pay for said work, as well as the other to be hereinafter mentioned, to be in coupon bonds of said defendants, bearing interest at ten per cent. per annum, and maturing on the first day of January,
4 1876, which bonds were worth a large sum of money, to wit, the sum of eighty cents on the dollar. And for that the plaintiff, with said Keary, was required by the said engineer, in accordance with said contract and covenant, to do the following work, to wit: 800,000 cubic yards of graduation and piling on the said Cammack levee; 300,000 cubic yards on the said Christmas levee; 80,000 cubic yards on the said Gibson levee, and 120,000 cubic yards on the said Skipwith levee; and to do 130 acres of surface breaking, at fifteen dollars per acre, and one hundred and nineteen (119) acres of heavy clearing and piling, at the price of one hundred and fifty dollars per acre, and forty-six acres of light grubbing and clearing, at forty dollars per acre; and also to do 112,066 cubic yards of graduation and piling on protection levees, at the price and sum of sixty-nine ¾ cents per cubic yard, with one-sixth added for shrinkage, making 80¼ cents per cubic yard.

And the plaintiff avers that in order to perform said work according to said contract and covenent, and relying upon and wholly trusting to the same, he employed at great cost and expense, in the different cities
5 of the United States, a large number of laborers, to wit, 800, at a cost of about two and a half dollars per day; purchased a complete outfit for carrying on and performing said levee work, consisting of 1,200 wheelbarrows, 600 double mattrasses, 101,000 feet of wheeling plank, 800 pairs of double blankets, 100 dozen Ames shovels, 16 large boilers, 10 small boilers, 100 dozen tin plates, 100 dozen tin cups, 100 dozen knives, 100 dozen forks, 5 doz. Collin's axes, ½ dozen coffee pots, 2 dozen large tin dishes, 6 doz. sheet-iron pans, ½ doz. tin horns, ½ doz hand saws, 3 large cross-cut saws, ½ dozen flesh forks, one lot of augurs, one lot of tapborers, 3 dozen water buckets, large scrapers, steel shod, &c., the total cost thereof being a large amount, to wit, the sum of sixteen thousand dollars. That as part of said outfit he purchased five kegs of nails of the value of $37.50, 25 double setts of scraper harness, with chains, back and hip straps, collars and harness, worth $175, two wagons, one cart and harness, sixty mules worth $1,800, and a large quantity of subsistence stores, worth, to wit, the sum of $35,000, and transported all of the said tools and implements, stock, wagons, outfit, and supplies to the said work at large cost, to wit, the sum of ten thousand dollars; that he constructed for the
6 use of said laborers the necessary cabins, cook houses, and bake ovens along the levees at large cost, to wit, the sum of $1,821, and without said covenant he never would have incurred said expenses.

And plaintiff avers that the preparation and purchases aforesaid were made upon the faith of said covenant and were necessary to enable him to perform the said work as he had covenanted and agreed to do, and being thus prepared to do said work according to the terms of said covenant, plaintiff began the same, on or about the 9th day of September, 1869, and from that time until about the 25th day of February, 1871, he did and caused to be done a large amount of said work, according to the said cov-

enant and agreement, to wit, all of the Skipwith levee, 111,267 cubic yards of the Cammack levee, 24,250 cubic yards of the Christmas levee, 39 acres of heavy grubbing and clearing, 21 acres of light grubbing and clearing, 30 acres of surface breaking, and 114,697 cubic yards of protection levee, and for said work, so done by him, the said defendants are justly indebted to him in a large sum of money yet unpaid, to wit, the sum of sixty-five thousand four hundred and eighty-two dollars.

7 And the said plaintiff further avers that he was, at all times, ready, willing, and able to do and complete the balance of the said levee work so covenanted to be done and performed, according to the terms and tenor of the said covenant, and the balance of said work so to be done would have yielded him as the benefit to be derived under the said covenant and agreement, a large sum of money, to wit, the sum of $368,623, that being the difference between the actual cost in cash of doing said work and the price which the defendants covenanted to pay for the same; the actual cost of graduation and piling being twenty cents per cubic yard, and the contract price for the Cammack levee being 81⅜ cents per cubic yard, payable in the bonds of defendant, due in 1876, then worth eighty cents on the dollar, and the contract price of the Gibson, Christmas, and Skipwith levees being 52⅝ cents per cubic yard, payable in the same bonds, and the cost of surface breaking in cash being $5 per acre, and contract $15 per acre; of light grubbing and clearing, $15 per acre cash, and contract price 40 per acre; and heavy grubbing and clearing 40$ per acre, and contract price $150.

8 And the plaintiff avers that while he was actually engaged in the said levee work so covenanted to be done and performed by him, with ample means to accomplish and complete the whole of said work, the said defendants, without any fault or negligence on his part and against his wishes and consent, to wit, on the 10th January, 1870, at the district aforesaid, ordered all further work on the said Cammack levee, so covenanted to be done by plaintiff, and for which the defendants had covenanted and agreed to pay as aforesaid, to be suspended, and notified and coerced plaintiff to desist from further work thereon until they, the said defendants, should otherwise order, and then and there forbid and prohibited plaintiff from completing said work on said levee, until further orders, and failed and refused to lay off any further work on said levee so as to enable plaintiff to complete and finish the said levee as he had undertaken to do. And the plaintiff says that he was ready, able, and willing, and desirous of doing the said work, and kept and detained all his outfit on or near said work, awaiting orders to commence the same again, and so con-

9 tinued for a long time thereafter, to wit, until the first day of April, A. D. 1871, but was prevented from so doing by the wrongful acts of defendants.

And plaintiff further says that prior to the commencement of said work under the said covenant the said Keary withdrew therefrom to the knowledge and with the consent of defendants, and sold his interest in and to the said covenant to plaintiff, and has no interest in this suit; and thereafter plaintiff undertook to carry out and complete the said covenant, of all which defendants had notice, and to all which they assented, plaintiff paying over to said Keary for his interest in said contract a large sum of money, to wit, the sum of $6,500, and all estimates for work done on said levees being issued to and in favor of plaintiff.

And plaintiff further says that on the 26th day of March, A. D. 1877, he instituted his action in the said circuit court of the United States against the said defendants for breach of the said covenant, in his own name, and that on or about the 5th day of April, A. D. 1878, the same was tried in said court upon the one issue involved therein as to the plaintiff's
10 legal title when suit was brought, and his said action was avoided or defeated for matter of form, in this, to wit, because though it appeared in the evidence that one Thomas Boyle had purchased the said claim under said covenant against said defendants at a sale thereof, made by plaintiff's assignee in bankruptcy, in the State of Tennessee, and city of Memphis, for the sole use and benefit of plaintiff, the formal assignment made by him to plaintiff was not in fact executed and delivered until after the said action had been brought, though antedated to conform to the fact, and therefore that the said action should have been brought in the name of the said Boyle, for plaintiff's use. And plaintiff further states that he has paid all the costs of the said action.

And the plaintiff further states that on the 17th day of February, A. D. 1875, he was adjudicated a bankrupt on his own petition, and has since been discharged as such; that on the 23d day of September, A. D. 1876, in pursuance of a general order of the district court of the United States for the western district of Tennessee, in bankruptcy, one Owen
11 Woodbridge, assignee in bankruptcy of plaintiff, exposed at public sale the said claim under said covenant hereinbefore set forth which had been surrendered by plaintiff as part of his assets, according to law, and one Thomas Boyle became the lawful purchaser thereof at and for the sum of five hundred dollars, which was paid, and received from said assignee a bill of sale and assignment therefor; that on the 16th day of January, A. D. 1877, the said Boyle, having purchased said claim for plaintiff, gave him a writing declaring the same, and afterwards, to wit, on the 28th day of January, A. D. 1878, executed and delivered to plaintiff a bill of sale and assignment therefor antedated according to the facts.

Whereby and by reason of the premises the plaintiff suffered great loss and damage in not being permitted to complete the said work and derive the great benefit secured by said contract, to wit, the said sum of $368,623; that he lost the further sum of ten thousand dollars on supplies and outfit; the sum of ten thousand dollars loss on the transportation of labor, supplies and outfit; the sum of ten thousand dollars on
12 account of his hands being unemployed, and loss of means whereby to meet his debts, necessitating his bankruptcy; and that defendants are indebted to him in a large balance for work done and accepted to wit, the sum of seventy thousand dollars, notwithstanding which defendants, though often requested, have hitherto wholly failed and refused, and still fail and refuse, to pay to plaintiff the whole or any part thereof, or of said several sums of money, to plaintiff's damage $500,000; therefore he sues, &c.

NUGENT & McWILLIE, *P. Q.*

(Endorsed:) Filed Dec. 21, 1878. J. M. McKee, clerk.

EXHIBIT A.

The am't of cubic yards of embankment completed by P. G. Meath, contractor, on the following works, commencing on the 14th day of Sept., A. D. 1869, and terminating on the 12th day of April, 1870:

13	The Cammack main levee	109,456 cubic yards.
	The Cammack protection levee	109,999 cubic yards.
	The Skipwith levee	61,837 cubic yards.
	The Christmas levee	23,624 " yards.
	The Skipwith roadway embankment	300 " yards.
	Total cubic yards of embankment	305,216 cubic yards.

The contract of P. G. Meath for doing the above-named work adds or gives one-sixth for shrinkage, which is equal to excavation measurement 50,869⅔ cubic yards @ 69¾ cents per c. y'd, contract price, $35,481.12¾.

14 Am't of work taken by Keary & Meath from the levee commissioners of the counties of Bolivar, Washington, & Issaquena, in the State of Mis., on the 13th day of August, A. D. 1869, in the town of Greenville, Washington County, Mis.

Amt.:	The Cammack levee....c. yds...	800, 000
	The Chrismas levee....c. yds...	300, 000
	" Skipwith levee....c. yds....	120, 000
	" Gibson levee....c. yds....	80, 000
	The Cammack protection levee, taken by Meath.....	114, 697
	Total am't....cubic yds...	1, 414, 697

Am't complete of the above when stopped by the commissioners & engineers.

Cammack main	levee....c. yds...	111, 267
The Cammack protection	" ....." " " ...	114, 697
" Skipwith	" ....." " " ...	120, 000
Chrismas	"	24, 250
	Am't complete.....	370, 214
	Unfinished when stopped....c. yds...	1, 044, 483
	Am't unfinished Cammack....c. yds...	688, 733
	Contract price in coupon bonds	81c
		557, 873 73
	Bonds were worth	80
		$446, 299 00
	Actual cost of doing work, 20c.....	137, 746 60
	Am't profit.....	$308, 552 40

15	Am't brought forward.....		$308,552 40
	Am't unfinished Chrismas...c yds...	275,750	
	Contract price in coupon bonds.....	54⅚c	
		$151,192 92	
	The bonds were worth.....	80c	
		$120,954 30	
	Actual cost of doing the work, 20c.....	55,150 00	
			65,804 30
	Am't unfinished of Gibson.....c. yds....	80,000	
	Contract price in coupon bonds.....	54⅚	
		$43,666 66⅔	
	Bonds were worth	80c	
		$34,933 30	
	Actual cost of doing the work, 20c.....	16,000 00	
			$18,933 30
	Am't profit in cash		$393,290 00
	" of work done by F. Biggins on the Skipwith Levee in Nov., '70, & Feb'y, 1871, cubic yds. 60,000, @ 4⅚, in bonds...	$2,900	
	Bonds were worth	80c	
			2,320 00
	Am't to Meath's credit on levee companies' books, (see report of investigating committee appointed by the legislature at Jackson, Mis.,) up to October 23rd, 1870.....	$16,888 35	
	In bonds worth	80c	
			13,510 65
	Am't Major Proctor's estimate, resident engineer on the work, & disputed by the chief engineer.....c. yds...	10,798	
	Contract price in coupon bonds.....	69¾	
		$7,531 60	
	The bonds were worth.....	80c	
			6,025 30
	Am't forward		415,145 95
16	Am't brought forward.....		$415,145 95
	Am't heavy grubbing & clearing .....acres...	119	
	Amount complete when stopped.....	39	
	By balance of acres	80	
	Contract price in coupon bonds.....	$150	
		$12,000	

Bonds were worth	80c	
	9,600	
Actual cost of doing the work, $40	3,200	
		6,400
Am't light grubbing & clearing.....acres...	46	
Complete when stopped.....	20	
By balance of acres	26	
Contract price in coupon bonds.....	$40	
	$1,040	
Bonds were wor'h	80	
	$832	
Actual cost of doing the work, $20	520	
		312
Am't surface breaking .....acres...	130	
Complete when stopped.....	31.50	
	98.50	
Contract price in coupon bonds.....	$15	
	$1,477 50	
Bonds were worth	80	
	$1,182	
Actual cost of doing the work, $5	499 50	
		690
		422,547 95
Am't outfit, see page 5.....		19,262 80
Am't total.....		$441,810 75

17 Outfit on the Cammack, Skipwith, & Chrismas Levees.

1,200 wheelbarrows, @ 3.50 ea.....	$4,200
600 double mattrasses, @ 3.50 ea.....	2,100
101,000 ft. wheeling plank & for use of tables, benches, &c., @ $30 per M., board measure.....	3,030
800 p'r of double blankets, @ 3.50 ea.....	2,800
200 p'r of single blankets, @ $2 ea	400
100 doz. Ames' shovels, @ $16 per doz.....	1,600
16 l. boilers, @ $9 ea.....	144
10 sm'l " " $4 "	40
100 doz. tin plates, @ $1.50 per doz.....	150
100 " " cups, " " " "	150
100 " knives, " " " "	150
100 " forks, " " " "	150
5 doz. Collins' axes, @ $24	120

½ " L. coffee-mills, @ 3.50 ea	21	
2 " L. tin dishes, @ 2.50 "	60	
6 doz. sheet-iron pans, @ $15 per doz	90	
½ " tin horns, @ $1.25 ea	7	50
½ " hand-saws, @ 2.50 ea	15	
3 l. cross-cut saws, " $12 "	36	
½ doz. carving knives, @ $2 "	12	
½ " flesh forks, @ $1.50 "	9	
One lot of augers	13	
" " " tap borers	4	
3 doz. water-buckets, @ $3.60 per doz	10	80
18 Cost of building cabins along the line of said levees, such as sleeping cabins, cooking cabins, eating cabins, and bake ovens at a cost, to wit	1,821	
9 large scrapers, steel shod, ea $13	117	
	$17,250	30
25 double set' of scraper harness, @ $7 per set	175	
5 kegs of 8, 10, & 12-penny nails, $7.50	37	50
6 mules, 2 wagons & harness	$1,725	
1 cart & harness	75	
	$19,262	80

(Endorsed:) Filed with declaration Dec. 21st, 1878. Jas. M. McKee clerk.

EXHIBIT B.

This agreement, made the thirteenth day of August, eighteen hundred and sixty nine, by and between Martin Keary and P. G. Meath, of the firm of Keary & Meath, of the first part, and "The Board of Levee Commissioners for the Counties of Bolivar, Washington, and Issaquena," Mississippi, of the second part, witnesseth:

That for and in consideration of the payments and covenants hereinafter mentioned, to be made and performed by said levee commissioners,
19 the first party hereby covenants and agrees to construct and finish in the most substantial and workmanlike manner, to the satisfaction and acceptance of the chief engineer of said levee commissioners, all the graduation, piling, and such other work as may be required in sections named Skipwith, Cammack, Christmas, & Gibson levees in Issaquena County, Mississippi, on said levee; the said work to be finished as described in the following specifications, and agreeeably to the directions from time to time of the said engineer, on or before the 1st day of April, eighteen hundred and seventy-one.

SPECIFICATIONS.

1. *Construction.*—Under this head will be included all excavations and embankments required for the formation of the levee, cutting all ditches or drains about or contiguous to the levee, the foundation of culverts, the excavation of embankments necessary for reconstructing public roads or

passways in cases where they are destroyed or interfered with in the construction of the levee, and all other excavations and embankments connected with or incident to the construction of the levee, the grubbing and clearing of all timber and other vegetable matter within the levee way,
20 the spading or plowing of the surface within the levee way and felling of all trees within one hundred feet of the central line of the levee that exceed one foot in diameter at the stump.

2. All cuttings other than borrowing for embankment shall be measured in excavation and estimated by the cubic yard and paid for as earth.

3. The levee will be graded 8 feet wide on top, except when otherwise directed by the chief engineer, with side slopes of such inclination as the chief engineer shall in each case designate (usually 4 to 1 on the river side and 2 to 1 on the land side), and in conformity to such heights of filling as may have been or may hereafter be determined upon by the chief engineer. In all cases material for the levee shall not be procured within a less distance of the slope stakes than the height of the levee at that place, estimated at 3 feet above high-water mark. When wings or temporary levees are built, the chief engineer may in each case direct less dimensions (they will usually have a crown of 4 feet, with slopes of 3 to 1 and 2 to 1).

4. Ground to be occupied by the levee must first be cleared of
21 trees, stumps, logs, trash, weeds, and all perishable matter, the trees and stumps being cut level with the surface of the ground. The entire surface must then be entirely broken with the spade or plow in order to form a bond with the earth deposited. Then a mud ditch must be cut 4 feet wide at top, 2 feet at bottom, and 3 feet deep; all stumps and roots crossing it being carefully taken out and removed beyond the base of the levee. The muck ditch must be cut one foot from the center line of the levee (great care being exercised not to displace any stakes of the center line), on that side next to the river, the earth from it being thrown entirely on that side of the ditch next to the river. As each section of a mile in length is thus cleared, broken, and muck ditch cut, the contractor must notify the engineer in charge of the fact, when he will measure the contents of the ditch and the area of the surface broken, and then set stakes each side of the center at the proper distance for the base of the levee. But in no case will these stakes be set till the clearing, surface breaking, and muck ditch are done, as above described, one-fourth mile in advance of the embankment, and no embankment put up without
22 this previous preparation or before the side stakes are set will be estimated or paid for. As soon as the work is staked the muck ditch must be filled in again with buckshot earth or clay obtained from without the base of the levee, if sand was the material which was taken out, and the earth tramped in by horses or mules ridden rapidly backwards and forwards constantly while the earth is being deposited, at least one horse to every 4 wheelbarrows being thus employed; or it shall be mauled as the ditch is being filled, in the proportion of 2 maulers to 1 filler. When the material taken from the muck ditch is buckshot or clay none need be taken from beyond the limits of the levee, but is to be filled into the muck ditch, tramped or mauled as above. This filling and tramping to be kept one-fourth mile in advance of the embankment. In case of repair of old levee all stumps, logs, and trees, where they are known to exist, must be dug out, and the muck ditch cut near the inside face of old

levee, unless the engineer in charge shall ascertain it to be unnecessary from its previous mode of construction. The surface of all old
23 levees must be well broken. In cases where the chief constituent of the levee is sand or other porous material the chief engineer may require a wall of buckshot or clay 5 feet thick to be continued up from the muck ditch to the top of the levee, the earth being tramped or mauled as in the muck ditch, as the levee is built up on each side of it, the object being to obtain a stratum through the levee impervious to sipe water. Or in case the chief constituent of the levee is stiff buckshot or clay the chief engineer may require a wall of sand 8 feet thick to be continued up from the surface of the muck ditch to high-water mark, as the levee is built up on each side of it—the object in this case being to obtain a perpendicular stratum through the levee impervious to crawfish. The extra cost for procuring suitable material for filling muck ditch and wall, if any, to be determined hereafter in each case and paid for.

5. When the ground is prepared, as required by article 4, the embankment will be commenced, and must be formed in uniform layers not exceeding 3 feet in thickness, a sufficient number of dumping men
24 being constantly kept on the levee to spread the earth as it is wheeled or carted in. The slopes shall in every case be commenced full up to the side stakes and carried regularly up as the embankment progresses, with a slope of 4 to 1 on the river side, 2 to 1 on the other side if of buckshot or clay, and 5 to 1 on the river side, and $2\frac{1}{2}$ to 1 on the other side if of sand, except when otherwise directed, so that when the necessary allowance of shrinkage shall have been added to grade at top it will give the required width of 8 feet at top of settling. Nothing will be paid for settling, but its cost will be included in the price paid for the levee, as estimated up to true grade. The engineer in charge in setting the side stakes will mark on them the height of true grade, but the contractor must build the embankment one-fifth higher than the height marked on the stakes, for shrinkage or settling when built, entirely with wheelbarrows, one-seventh when built entirely with carts, and one-eighth when built entirely with scrapers, this allowance being so disposed on the top and slopes as to give the required width of 8 feet at top
25 of settling, and to fill out the slopes so as to make one plane from edge of crown to base of levee. As each continuous one-fourth mile is thus finished the contractor must notify the engineer in charge, and he will retrace the original centre line of levee and place on each side of it "grade" stakes half the width of the crown from the centre line, driven to the elevation of true grade, plus 1-5th, 1-7th, or 1-8th, as the case may be, the height of the levee at the respective stations. If the levee be found deficient in height, slopes, or base, or not to have the full settling on the top and slopes, the contractor must go over it and correct all deficiencies, being required to have the full amount of shrinkage over the entire one-fourth mile, when the engineer in charge sets the grade stakes.

6. Materials taken from the ditches or drains, except when otherwise directed by the engineer in charge, shall be deposited in the adjacent levee, the cost of removing which when the haul is no more than 300 feet will be included in the price paid for excavation. In procuring material for the levee the place will be designated by the engineer in charge,

26 always on the river side, unless otherwise directed; and in excavating and removing it care must be taken to injure or disfigure the land as little as possible. If from unavoidable causes it becomes necessary to procure material on the inside of the levee it must not be taken within 60 feet of the base. But it is not to be taken from the inside at all unless forced by high water or some insuperable difficulty, and then only upon the written order of the chief engineer designating the place. In procuring material for the embankment, if the place designated by the engineer in charge exceed 300 feet from the centre line of the levee one and a half cents per cubic yard will be paid, in addition to the contract price, for every 100 feet of average haul exceeding 300 feet that said material may be transported. All levees shall be estimated in embankment and not in excavation, and be paid for by the cubic yard.

7. All earth designed for embankment must be entirely divested of roots, trash, and all other perishable matter before being taken into the carts, wheelbarrows, or scrapers.

8. A sipe ditch will be excavated 4 feet to the rear of back slope
27 of levee, 3 feet wide on top, 1 foot at bottom, and 1½ feet deep, material to be thrown into the levee, and for which no extra pay shall be given.

9. The chief engineer may, whenever he deems it necessary, require a double course of sheet piling, breaking joints, to be driven at the centre on either side of the levee 5 feet below the surface of ground and extending up to high-water mark, the plank to be of heart red gum, white oak, or cypress, or such other timber as the chief engineer may select, of such dimensions as he may determine, material and labor to be paid for by the 1,000 feet board measure; all filling must be driven in advance of the levee, and the embankment constructed on both sides of the piling simultaneously. The chief engineer may also, whenever he deems it necessary, require a breakwater hedge of willows to be planted in front of the levee, in four rows, 6 feet apart each way, labor to be paid for by the lineal rod. The chief engineer may also require the surface of the levee to be planted with Bermuda grass, 3 feet apart, for which a separate allowance will be made and paid for by the square yard.

28 10. The line of levee or grade may be changed if the chief engineer shall consider such change necessary or expedient, and for any considerable alterations the injury or advantage to the contract or will be estimated and such allowance or deduction made in the prices as the chief engineer may deem just and equitable; but no claim for an increase in prices on the part of the contractor will be allowed or considered unless made in writing, distinctly setting forth the ground of such claim and the amount of increase asked for before the work on that part of the section where the alteration has been made shall have been commenced. The chief engineer may also, on the conditions last recited, increase or diminish the length of any section.

11. Wherever the route of the levee is traversed by public or private roads, commodious passing places must be kept in condition for use, and in passing through farms the contractor must also keep up such temporary fences as may be necessary for the preservation of the crop.

29 12. No charge shall be made by the contractor for hindrances or delays from any cause in the progress of any portion of the

work in this contract, but it may entitle him to an extension of the time allowed for the completion of this work, sufficient to compensate for the detention, to be determined by the chief engineer, provided he shall give the engineer in charge immediate notice in writing of the cause of detention. Nor shall any claim be allowed for extra work unless the same shall be done in pursuance of an order from the engineer in charge, and the claim, certified by the engineer in charge, to be presented to the chief engineer at the first settlement after * * * * was executed, unless the chief engineer, at his discretion, should order the claim, or such part of it as he may deem just and equitable, to be allowed.

13. The ends of all levees shall be protected when threatened by floods before they are completed by fascines of cane or brush, secured firmly to the bank, extending across the base and around each side not less than 100 feet. This protection may be put up in anticipation of destructive
30 floods. The chief engineer may also require the base of the levee to be covered with a causeway of fascines whenever necessary to support the embankment, for which an extra compensation, to be determined in each case, will be made. The average haul of excavation or embankment is the quotient of the sums of the product of each cubic yard by its respective haul divided by the total number of cubic yards.

14. All damage or injury done to the work resulting from flood or other cause shall be sustained by the contractor till finished and received by the chief engineer, and no work shall be received until fully and completely finished in accordance with the above specifications, nor in less quantities than one mile at a time, and before any section is finally received all trees exceeding one foot in diameter within 100 feet of the centre of the levee must be cut. No separate allowance will be made for felling trees without the levee, but its cost will be included and the price paid for embankment. The word contractor as used in this instrument applies exclusively to the first party.

31 15. The above specifications, if misunderstood, will be fully explained by the engineer in charge, but if wilfully neglected no measurement or estimate will be made on the work until they are complied with; and the said levee commissioners agree to pay the first party for completing this contract according to its terms the prices affixed to the different items opposite the sections numbered in the annexed schedule.

It is expressly understood that the prices herein stipulated to be paid refer to final and accurate estimates of the work embraced in this contract; and it is further understood that the quantities and values of work embraced in this contract at the date of its ratification, as shown on the plans and profiles, are only approximate; and that no subsequent diminution or increase in the amount of work that may arise, either from error in the original estimates or from any changes which the chief engineer may make in the gradients, alignment, or length of section, shall entitle the first party to any allowance whatever (except as provided for in article
32 ten of the specifications) beyond a final estimate of the work made from side stake-notes and other notes taken on the ground before the work is commenced; it being particularly understood that no measurement of the work will be taken after its completion.

On or about the first day of every month, during the progress of this work, an estimate shall be made of the relative value of the work done, to

be judged of by the chief engineer, and upon his certificate of the amount, audited by the president and countersigned by the secretary, being presented to the treasurer, four-fifths of the amount of said estimate shall be paid to the first party, in the character of funds specified on the next page, under "the schedule of prices and work," at such time and place as the treasurer may designate; provided the amount due on said estimate to the first party shall be more than hundred dollars; and when all the work embraced in this contract is completed, agreeably to the specifications, and in accordance with the directions and to the satisfaction and acceptance of the chief engineer, there shall be a final estimate made of the
33 quality, character, and value of said work, agreeably to the terms of this agreement, when the balance appearing due to the first party shall be paid to them upon their giving a release under seal to the said levee commissioners from all claims or demands whatsoever growing in any manner out of this agreement. but will give personal attention and superintendence to the work, nor shall the first party employ any person who commits depredations on the neighborhood, or insults travelers or other persons; and all such disorderly persons shall be discharged from employment whenever the first party shall be directed so to do by the engineer in charge.

It is further agreed and understood that the work embraced in this contract shall be commenced in thirty-five days from this date, and prosecuted with such force as the chief engineer shall deem adequate to its completion within the time specified; and if at any time the first party shall refuse or neglect to prosecute the work with a sufficient force, in the
34 opinion of the said engineer, for its completion within the time specified in this agreement, then and in that case the president of the said board of levee commissioners may employ such number of workmen, laborers, and overseers as may, in the opinion of the chief engineer, be necessary to insure the completion of the work within the time herein before limited, at such wages as he may find it necessary or expedient to give, pay all persons so employed, and charge the amount so paid to the first party, as for so much money paid to said first party on this contract; or the chief engineer may, at his discretion, for the failure to prosecute the work with an adequate force, for non-compliance with his directions in regard to the manner of constructing it, or for any other omission or neglect of the requirements of this agreement and specifications on the part of the first party, declare this contract, or any portion or section embraced in it, forfeited; which declaration and forfeiture shall exonerate the second party from any and all liabilities and obligations arising under this contract, the same as if this agreement had never been made, and any amount
35 reserved upon any work done by the first party may be retained forever by the second party.

In witness whereof the parties have signed and sealed the same the day and year first-above written.

J. E. EDMUNDS, President. [SEAL.]
P. G. MEATH. [SEAL.]
MARTIN KEARY. [SEAL.]

36 *Schedule of prices and work on the Mississippi levees.*

Name of section.	Excavation and embankment, per cubic yard.		Breaking surface of ground, per acre.		Sheet piling and breakwaters, including workmanship, per thousand feet b. m.		Excavating and tramping muck ditch, per cubic yard.	Grubbing and clearing, per acre.		Remarks.
	Excavation.	Embank'nt.								
	Cts.	Cts.	Dolls.	Cts.	Dolls.	Cts.	Cts.	Dolls.	Cts.	
Skipwith levee	47	47	15	....	.....	....	47	150	....	When heavy.
								40	....	" light.
Cammack levee	69¾	69¾	15	....	.....	....	69¾	150	....	When heavy.
								40	....	" light.
Christmas levee	47	47	15	....	.....	....	47	150	....	When heavy.
								40	....	" light.
Gibson's levee	47	47	15	....	.....	....	47	150	....	When heavy.
								40	....	" light.

37 It is further agreed and understood that the preparation of foundations, such as putting in grubbage, using fascines, turning water, straining and pumping, if any be necessary, will be paid for by the time spent at such work at the rate of $2.75 per day for each hand. It is agreed that the deduction of $\frac{1}{5}$ from each monthly estimate of such work be retained until the final completion of each of the above work.

It is further agreed and understood that said contractor be allowed on the Cammack, the Christmas, and Skipwith levees $\frac{1}{6}$ for shrinkage, which is equal to excavation measurement; also, that the work on the Cammack levee be received in sections of $\frac{1}{4}$ of a mile, when properly finished according to the foregoing specifications.

It is further agreed and understood that the within-named contractors are not to be held responsible for the natural events or circumstances beyond their control that may result in any injury or damage to that portion of the work finished and received by the engineer in charge.

Payments for all work performed to be made in coupon bonds of the commissioners maturing 1st day of January, 1876.

38 *Bond.*

STATE OF MISSISSIPPI:

We, A. Ginello, J. S. Bazinsky, and S. Spengler, acknowledge ourselves indebted to the board of levee commissioners for the counties of Bolivar, Washington, and Issaquena, Mississippi, in the sum of one hundred thousand dollars, to be paid on the 1st day of June, 1871.

The condition of this obligation is such, that whereas Keary & Meath did, on the 13 day of August, 1869, enter into the agreement hereto attached with the said board of levee commissioners for the work therein described: now if the said Keary & Meath do well and truly perform all the covenants of said agreement, then this obligation to be void; otherwise to remain in full force.

A. GINELLO.
J. S. BAZINSKY.
S. SPENGLER.

(Endorsed:) Filed with declaration, Dec. 21st, 1878. J. M. McKee, clerk.

39 Know all men by these presents that I, Thomas Boyle, of Memphis, Tennessee, have bargained, sold, and assigned to Patrick G. Meath, of said city and State, all my right, title, and interest in and to sundry levee claims against the county of Issaquena, amounting to some $50,000 principal, and pledged in part to the Emmet Bank, at Memphis, Tennessee, and in and to all, any, every claim held by said Meath against the board of levee commissioners for Bolivar, Washington, and Issaquena Counties arising under a contract made by said Meath and Martin Keary with said board in August, 1869, for the building of the Cammack, Skipwiths, Gibson, and Christmas levees in Issaquena County, the same having been sold by Oscar Woodbridge, assignee, November 23, 1876, and purchased by me for said Meath, hereby vesting said Meath with all the title acquired by me at said sale, and authorizing him to sue for and recover the same at his own expense, it being, however, fully understood that out of all the proceeds of any suit brought to recover said claims I am to be first paid the sum of five hundred and fifty dollars, advanced by
40 me to purchase said claims, and interest thereon from the day of purchase.

Given under my hand and seal this 16th Jan'y, 1877.

THOS. BOYLE. [SEAL.]

STATE OF TENNESSEE,
City of Memphis:

COMMISSIONER'S OFFICE.

I, M. B. Trezevant, a commissioner of the State of Mississippi, duly appointed by the governor thereof, for the State of Tennessee, to reside in the city of Memphis and take the acknowledgments and proof of the execution of deeds or other conveyances or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions, &c., to be used or recorded in said State of Mississippi, do certify that on this day personally appeared before me Thomas Boyle, to me known to be the individual named in, and who executed, the annexed assignment, and acknowledged that he signed, sealed, and delivered said assignment as his voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 28th day of January, 1878.

[SEAL.] M. B. TREZEVANT,
Commissioner for Mississippi, at Memphis, Tenn.

(Endorsed:) Filed with declaration, Dec. 21st, 1878. Jas. M. McKee, clerk.

41 P. G. MEATH
vs.
ISSAQUENA COUNTY, MISS.

Pending in the chancery court of said county in Miss., and also in the Federal court at Jackson, Miss., in the name of the Emmett Bank vs. the same county.

At the bankrupt sale of P. G. Meath, by Oscar Wooldridge, assignee in bankruptcy of said Meath, Thomas Boyle for said Meath bid off his claim

vs. Issaquena County, Miss., his claim vs. Phillips County, Ark., and various other claims. Said Boyle is to be fully reimbursed out of the property bid off for the outlay by him in that behalf. He is not desirous of incurring expenses in the prosecution of these claims, but is willing that said Meath, who is the real beneficiary, subject to the right of said Boyle to be reimbursed, may carry on said litigation. Now, with this understanding said Boyle furnishes said Meath with copies of his bill of sale for the Issaquena County claim, and fully authorizes said Meath, at his (Meath's) expense however, to use his (Boyle's) name in carrying on the suit at Issaquena ch'y court and in the Federal court at Jackson, Miss., and
42 wherever else it may be necessary; the said Boyle in no manner to be liable for fees of counsel or for costs. The proceeds recovered are to be subject to the repayment of all outlays of said Boyle for said Meath, the balance to be the property of said Meath. In regard to the Phillips County claim, the said Meath, in the same way and subject to the same equities, may carry on all necessary litigation in his name for the use of said Boyle. The suit of Meath vs. Leverson & McNeal in the ch'y court of Shelby County may be carried on in said Meath's name, subject to the same equities and in the same way. If, as to the Issaquena claim, it is preferred, the suit may be carried on in said Meath's name for the use of said Boyle, subject to the understanding contained in this paper.

Jan'y 16th, 1877.

P. G. MEATH.
THOS. BOYLE.

(Endorsed:) Filed with declaration Dec. 21st, 1878. Jas. M. McKee, clerk.

43 And on the 23d day of December, A. D. 1878, a summons issued from the clerk's office of said court, which, with the return of the marshal thereon, is in words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Mississippi, sc.:

The President of the United States to the marshal of the southern district of Mississippi, greeting:

We command you that, without delay, you summon the Board of Levee Commissioners of Bolivar, Washington, and Issaquena Counties, a corporation of the State of Mississippi, domiciled in the County of Washington, in said district, now known as the Board of Mississippi Levee Commissioners, defendants, residing in said district, and citizen of the State of Mississippi, that they be and appear at the circuit court of the United States, to be held at the court-room thereof, in the city of Jackson, in and for the southern district of Mississippi, on the first Monday of May next, to answer to Patrick G. Meath, plaintiff, who is a citizen of the
44 State of Tennessee, of a plea of covenants broken, founded on a contract entered into on the 13th day of August, 1869, by and between Martin Keary and P. G. Meath and the Board of Levee Commissioners for the said county, which the plaintiff alleges hath been broken by the defendants, to his (the plaintiff's) damage five hundred thousand dollars ($500,000) as alleged, and that they do file their plea or defense in

said court on or before the said meeting thereof, or judgment will be given against them by default.

And have you then there this writ, and how you have executed the same.

Issued under my hand, with the seal of said court hereto affixed, at Jackson, in said district, this 23rd day of December, A. D. 1878.

[SEAL.] JAS. M. McKEE, *Clerk.*

UNITED STATES AMERICA,
Southern District Mississippi:

I, Thos. W. Hunt, U. S. marshal, do hereby appoint W. E. Hunt my special deputy to execute and return this writ.

THOS. W. HUNT, *U. S. Marshal.*

Rec'd Dec. 30th, 1878.

THOS. W. HUNT, *U. S. M.*,
By W. E. HUNT, *S. D. U. S. M.*

45 Returned executed this 4th day of Jan'y, A. D. 1878, by handing to S. W. Ferguson, president of the Board of Mississippi Levee Commissioners, a true copy of this writ in person.

THOS. W. HUNT, *U. S. M.*,
By W. E. HUNT, *S. D. U. S. M.*

And afterwards, to wit, on the 20th day of May, A. D. 1879, being a day in the regular May term, A. D. 1879, of said court, an order was made in said cause in words and figures following, to wit:

PATRICK G. MEATH
vs. } 2617.
BOARD OF MISSISSIPPI LEVEE COMMISSIONERS.

Continued by consent of counsel, with leave to the defendant to plead during the present term of this court.

And on the 29th day of May, A. D. 1879, being a day in the last above-mentioned term of said court, an order was made in said cause in words and figures following, to wit:

P. G. MEATH
vs. } 2617.
BOARD OF MISSISSIPPI LEVEE COMMISSIONERS.

By consent of parties it is ordered that defendant have leave to plead herein within forty days from this date as of this term.

46 And afterwards, to wit, on the 21st day of June, A. D. 1879, seven pleas were filed by defendant, in words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Circuit court, May term, 1879.

PATRICK G. MEATH
vs.
BOARD OF LEVEE COMMISSIONERS.

I. And the said defendant, by its attorney, and by special leave of the court first had and obtained, says that it is not true, as stated in said declaration, that said defendant notified and coerced said plaintiff to desist from further work on said Cammack levee, or prevented said plaintiff from completing said work on said Cammack levee, or any other of said levees; or that said plaintiff was ready, willing, and desirous of doing said work, and kept and detained all his outfit in said work awaiting orders to commence the same, and so continued until the first day of April, 1871,
or for any time, but was prevented by said defendant, or that said
47 plaintiff did, according to said covenant and agreement, do the work stated in said declaration, or any part thereof, in the Skipwith, Cammack, Christmas, and Gibson levees, or the protection levee, or the surface breaking or grubbing, as stated; or that said plaintiff did any part of said work; or that defendant is indebted to said plaintiff therefor in the sum of sixty-five thousand four hundred and eighty-two dollars ($65,482.00), or $30,000, or any sum whatever; or that in order to perform said work said plaintiff employed the laborers, purchased the outfit, and built the cabins, houses, and ovens, as stated in said declaration, or at the cost therein stated, or at any cost; or that the balance of said work under said covenant would have yielded said plaintiff as profit the sum of $368,628, or any sum whatever, or that he would have derived any profit whatever therefrom; or that said plaintiff has lost any sum whatever by reason of not being permitted to complete said contract, or on supplies and outfit, or cost of transportation of labor, supplies, and outfit to the work,
or on account of hands being unemployed; or that defendant is
48 justly indebted to him in any sum; or that said chief engineer required said plaintiff to do the work stated in said declaration, or to do any work whatever on said levees. And of this said defendant, upon the country, &c.

W. A. PERCY AND FRANK JOHNSTON,
Attorneys for Defendant.

And pl'ff doth the like.

NUGENT & McWILLIE, *P. Q.*

II. And for a further plea in this behalf, pleaded by special leave of the court first had and obtained, said defendant, by attorney, says that said plaintiff ought not to further have or maintain his said action as to the sum of sixty-five thousand four hundred and eighty-two dollars, or the sum of thirty thousand dollars, or for any other sum of money whatever, for work and labor already done, because long prior to the commencement of this suit the defendant well and truly paid said alleged indebtedness,

and paid the plaintiff in full for all of said work done by him; and this defendant is ready to verify. Wherefore defendant prays judgment, &c.

W. A. PERCY AND FRANK JOHNSTON,
Attorneys for Defendant.

49 III. And for a further plea in this behalf, pleaded by special leave of court first had and obtained, the said defendant says that said plaintiff ought not to further have or maintain his said action, because it says that by reason of the negligence and want of skill and efficiency of labor upon the part of said plaintiff in the construction and building of the work done by said plaintiff on said Cammack levee and in the protection of said work so done by said plaintiff against the high water in the Mississippi River, as required by the chief engineer and by the terms of said covenant, said Cammack levee, or a large part thereof, was swept away by the floods of said river in the spring of 1870, and for which said work so swept away and lost said defendant had already paid said plaintiff one hundred and fifty thousand dollars, and by means of which a large territory which it was the duty of said defendants to protect from overflow was inundated, and the taxes due to said defendant, and to become due, and which would have been paid but for the loss of said levee, and have
50 not been paid in consequence thereof, amounted to the sum of five hundred thousand dollars; and said defendant avers that the cost of rebuilding said levee and repairing the loss occasioned by the negligence of said plaintiff will amount to $500,000. Wherefore said defendant save that by reason of the negligence and want of skill and labor and failure to perform his said contract upon the part of said plaintiff said defendant has been damaged to a large amount, to wit, to the amount of $500,000—and this defendant is ready to verify. Wherefore defendant prays judgment, &c.

W. A. PERCY AND FRANK JOHNSTON,
Attorneys for Defendant.

IV. And for a further plea in this behalf, pleaded by special leave of court first had and obtained, said defendant says that the plaintiff ought not to have or maintain his said action, because defendant says that, although it is true that defendant notified the plaintiff to desist from said work at the time averred by plaintiff, yet the plaintiff, notwithstanding said
51 notification or direction, abandoned said work voluntarily and willingly, and so consented to desist and quit work under and abandon the same, being unable from want of money, credit, ability, or labor to perform said contract, and not because of any orders or direction of the defendant in the premises—all of which defendant is ready to verify. Wherefore defendant prays judgment, &c.

W. A. PERCY AND FRANK JOHNSTON,
Attorneys for Defendant.

V. And for a further plea in this behalf, pleaded by special leave of court first had and obtained, said defendant says the plaintiff ought not further to have or maintain his said action, because it says that during the pendency of said covenant, and before plaintiff had completed his said work thereunder, the power and authority of said defendant to issue bonds under its charter of incorporation became exhausted, and it had issued to said

plaintiff and other contractors the full amount of bonds which it was authorized by law to issue, which defendant avers was the fact; and
52 that defendant notified plaintiff of that fact, and that for all work done in future he would be paid in such funds as the said defendant could command, and required plaintiff to proceed with said work, whereupon said plaintiff then abandoned said contract; and defendant avers that at the time when said covenant was made it was understood and contemplated by both plaintiff and defendant that the power of defendant under its charter to issue the special kind of bonds mentioned in the contract might become exhausted and a payment in different funds become necessary; and defendant was ready and willing to pay, and would have paid, plaintiff, and so offered to pay him in certificates of indebtedness of said board, available in payment of taxes, and valuable to an amount equal in money to the amount of bonds which would have become and were due to plaintiff for work done and to be done, which said defendant avers would have been a full compliance with the terms of said contract upon the part of said defendant—and this it is ready to verify, &c.

W. A. PERCY AND FRANK JOHNSTON,
Attorneys for Defendant.

53 VI. And for a further plea in this behalf, pleaded by special leave of the court first had and obtained, the said defendant says that said plaintiff ought not to have or maintain his said action, because it says that the several supposed causes of action in said declaration mentioned, if any such there were or still are, did not, nor did any or either of them, accrue to the said plaintiff at any time within seven years next preceding the commencement of this suit in manner and form as said plaintiff hath complained and this said defendant is ready to verify; Wherefore defendant prays judgment, &c., &c.

W. A. PERCY AND FRANK JOHNSTON,
Defendant's Attorneys.

VII. And for a further plea in this behalf, pleaded by special leave of the court first had and obtained, said defendant, by its attorney, comes and says that the plaintiff ought not to have or maintain his said action, because, though it is true that said plaintiff commenced his action on this covenant and contract under seal in the circuit court of the United
54 States for the southern district of Mississippi, on the 26th day of March, 1877, and said action was finally determined and adjudicated in favor of the defendant by said court on the day of , 18 , and the present suit was brought on the 28th day of December, 1878, yet it is not true, as averred in said declaration, that said former suit was decided and adjudicated against the plaintiff and in favor of the defendant for matter of form; nor is it true that said judgment was based solely on the fact that said suit ought to have been brought in the name of said Boyle for the use of the plaintiff P. G. Meath; and said defendant now avers that in said former suit said defendant, in its ninth plea, averred and pleaded before the commencement of the said former suit the plaintiff had been duly adjudicated a bankrupt by the United States district court for the western district of Tennessee, and an assignee in his estate had been appointed by said court, whereby the said claim sued on in the former

suit and the right of action on said covenant passed by operation of law to said assignee in bankruptcy of the plaintiff, and to this plea the
55 said plaintiff replied, in confession and avoidance, that on the 23d day of November, 1876, said claim or chose in action was sold by Oscar Wooldridge, assignee in bankruptcy of plaintiff, in pursuance of the bankrupt law and as required by law, and purchased by one Thomas Boyle for plaintiff, and that said assignee made, executed, and delivered to said Boyle a bill of sale thereto, and said Boyle afterwards, in January, 1877, made, executed, and delivered to plaintiff his assignment thereof, according to the terms of his agreement with plaintiff; and defendant now avers on the said plea (the 9th) in said former suit and the replication thereto issue was joined in short by consent of both parties; and defendant further avers that on the trial of said cause judgment was rendered by the court, having the effect of a verdict by stipulation in writing between the parties, on said ninth plea and replication, in favor of the defendant, all of which defendant will verify by the record; and defendant avers that on said trial the plaintiff proved a sale of the chose in action by
56 the assignee in bankruptcy, but did not offer in proof any order of said bankrupt court authorizing or directing said sale, and proved a written transfer by the assignee to Boyle, and also offered in evidence a written assignment from Boyle so fictitiously and fraudulently antedated as to appear on its face as if made before said former suit was brought, which fact of said antedating was shown as a fact by evidence in the cause, wherefore defendant insists that said judgment on said issue was not on matter of form but on matter of substance; and defendant avers that this present action has not brought within seven years after the cause of action accrued, and hence is barred by limitation, notwithstanding said former suit or action—all which defendant is ready to verify by proof. Wherefore he prays judgment, &c.

W. A. PERCY AND FRANK JOHNSTON,
Attorneys for Defendant.

(Endorsed:) Filed, by special order of court June 20, 1879, June 21, 1879. J. M. McKee, clerk.

And on the day and date last above mentioned an additional plea
57 was filed in words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Circuit court, May term, 1879.

PATRICK G. MEATH
vs.
THE BOARD OF LEVEE COMMISSIONERS.

And now comes the defendant herein by its attorney, and, by leave of court first had and obtained, for a further plea in this behalf says that plaintiff ought not to have and maintain his suit, because defendant says that on the 26th day of March, 1877, plaintiff brought his suit or action in this honorable court on the said covenant or bond sued on in the present

suit, and in said former suit the defendant pleaded specially and in bar of the suit the fact that the plaintiff had been before the commencement of said former suit adjudicated a bankrupt, and the title to said claim and right of action had passed to his assignee in bankruptcy; and in avoidance of said plea the plaintiff in said former suit replied, setting up and alleging
58 title in himself, derived under a sale made by said assignee in bankruptcy, one Woolridge, in pursuance of the bankrupt law, and purchase by one Boyle, and a written assignment from said Woolridge to Boyle, who purchased for the plaintiff, and alleged also a subsequent assignment in writing prior to said former suit from said Boyle to plaintiff, all of which said defendant in said former suit denied; and thereupon the court, on the trial of said former suit on said plea and replication and joinder of issue, rendered a judgment for the defendant, all of which defendant will verify by the record; and on the trial of said former suit the said plaintiff failed to prove any valid or legal title or right of action in said Boyle, and failed to prove any assignment from Boyle to plaintiff prior to the commencement of said former suit—which defendant is ready to verify. Wherefore defendant insists that said former judgment is conclusive and binding on plaintiff and a bar to this action. Wherefore defendant prays judgment, &c.

W. A. PERCY & FRANK JOHNSTON,
Def't's Attorneys.

(Endorsed:) Filed June 21, 1879. J. M. McKee, clerk.

59 And on the 4th day of August, A. D. 1879, a motion was filed and entered in said cause by plaintiff in words and figures following, to wit:

PATRICK G. MEATH
vs. } 2617.
LEVEE COMMISSIONERS.

Plaintiff moves the court to strike from the files defendant's 7th & 8th pleas, because they are improvidently filed and present no bar whatever to a recovery, and because not responsive to the declaration, and not showing that the suit was tried on its merits.

NUGENT & McWILLIE, *P. Q.*

(Endorsed:) Filed and entered. Motion docket, page 129. Aug. 4, 1879. J. M. McKee, clerk.

And on the day and date last above mentioned the following replications and demurrers were filed in said cause, to wit:

PATRICK G. MEATH
vs. } 2617.
BOARD OF LEVEE COMMISSIONERS.

2. And the said plaintiff, for replication to defendant's second plea by them above pleaded, say, that the defendants did not pay to
60 pl'ff the several sums of money as in said plea alleged; and this he prays may be inquired of by the country.

And defendants doth the like.

3. And for replication to defendant's third plea plaintiff says that the matters and things therein and thereby set forth and alleged are not true in point of fact, and that defendants were not damaged as alleged; and this he prays may be inquired of by the country.

And defendant doth the like.

4. And for replication to defendant's fourth plea plaintiff says that the matters and things therein and thereby set forth and alleged are not true in point of fact; and this he prays may be inquired of by the country.

And defendant doth the like.

5. And for replication to defendant's fifth plea plaintiff says that the matters and things therein and thereby set forth and alleged are not good and sufficient in law; wherefore plaintiff doth demur to the said plea and pray the judgment of this court whether any further or other answer
61 he ought to make thereto. And for causes of demurrer pl'ff assigns the following:

1. Said plea is informal and insufficient, and presents no ground of defence to this suit.

2. The defendant cannot plead its want of authority to issue bonds in defence of an action for money due pl'ff and damages for breach of contract.

3. The plea alleges new matter in mitigation of damages, and no bar to the suit.

4. The plea does not allege a want of power to make the contract in the first place.

6. And as to the sixth plea by defendant above pleaded plaintiff says that the same is insufficient in law; wherefore pl'ff doth demur to the same, and prays the judgment of this court whether any other or further answer he ought to make thereto. And for cause of demurrer plaintiff assigns the following:

1. Said plea does not allege *that* the bar of the statute of limitations prior to the commencement of the first suit referred to in the declaration.

2. The seven-years statute as to sealed instruments was not passed until April 19, 1873. (Acts '73, p. 42.)

62 3. The plea is not good to the present action.

NUGENT & McWILLIE, *P. Q.*

(Endorsed:) Filed Aug. 4, 1879. J. M. McKee, clerk.

And afterwards, to wit, on the 10th day of February, 1880, a demurrer to 7th & 8th pleas of defendant was filed in words and figures following, to wit:

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And the said plaintiff, as to the seventh and eighth pleas filed by defendants, say that the matters and things therein and thereby set forth and alleged are not good and sufficient in law; wherefore pl'ff doth demur to

the said pleas and pray judgment whether any other or further answer he ought to make thereto, and for causes of demurrer assigns the following:

1. Said pleas present no answer to the declaration.
2. They are informal and insufficient.
3. The former adjudication does not bar pl'ff's and is not conclusive.
4. The pleas do not allege that pl'ff's right of action was barred
63 when the first suit was begun.
5. And for other causes to be assigned.

NUGENT & McWILLIE, *P. Q.*

(Endorsed:) Filed Feb'y 10, 1880. Jas. M. McKee, clerk.

And on the day and date last above mentioned the following replication and agreement of counsel was filed in said cause, to wit:

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6. And the said plaintiff, as to the sixth plea filed by defendant, says that the matters therein pleaded are not true in fact, and this he prays may be inquired of by the country. And defendants do the like.

7. And as to the seventh plea of defendant, plaintiff says that the matters therein pleaded are not true in fact, and this he prays may be inquired of by the country.

NUGENT & McWILLIE, *P. Q.*

It is agreed that the issue under the sixth plea is joined by consent, and said issue is to be tried on the evidence under the 7th plea,
64 the same as if the facts had been specially pleaded under the 6th plea.

FRANK JOHNSTON & W. A. PERCY,
Att'r's for Def't.
NUGENT & McWILLIE,
Atty's for Pl'ff.

(Endorsed:) Filed Feb'y 10, 1880. Jas. M. McKee, clerk.

And on the same day and date an agreement of counsel was filed in said cause in words and figures following, to wit:

In the circuit court of the United States for the southern district of Mississippi.

PATRICK G. MEATH, PLAINTIFF,
vs.
THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS, DEFENDANTS. } 2617.

In this cause a jury is waived, and it is agreed to submit the cause to the court in lieu of a jury to be decided on the law and the evidence, and

separate findings thereof to be rendered by the court, so that the decision may be finally reviewed by the Supreme Court of the United States.

65 The court having, in the decision of the questions arising upon the demurrers to 6th and 7th pleas filed, expressed the opinion that the pending of the former suit could not be availed of to prevent the bar of the statute of limitations, and that this action is barred by limitation, it is agreed that that sole question shall be presented upon the pleadings and proof, and that only such evidence as in the judgment of the court bears upon that issue shall be incorporated in its findings and presented to the Supreme Court of the United States; and that the record for said court shall consist of the pleadings and exhibits, the orders of the court, the findings of fact and law in the cause, and this agreement. And it is further agreed that should the Supreme Court differ in opinion with and reverse the circuit court the cause shall be remanded for trial on its merits on all the other questions in the case.

NUGENT & McWILLIE,
For Pl'ff.
FRANK JOHNSTON,
Att'y for Def'ts.

(Endorsed:) Filed Feb'y 10, 1880. Jas. M. McKee, clerk.

66 And on the 10th day of February, A. D. 1880, being a day in the adjourned term of the regular November term, A. D. 1879, of said court, the following proceedings were had and done in said cause, to wit:

PATRICK G. MEATH
vs.
THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS. } 2617.

This day came on to be heard the motion of plaintiff to strike out the seventh and eighth pleas filed by defendant, and the court considers and orders that said motion be, and the same is hereby, overruled; whereupon plaintiff demurs to said pleas.

PATRICK G. MEATH
vs.
THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS. } 2617.

This day came on to be heard the demurrer of plaintiff to defendants fifth, sixth, seventh, and eighth pleas, and the court being thereof sufficiently advised doth consider and order that said demurrer be, and the same is hereby, sustained as to said fifth and eighth pleas, and overruled as to the said sixth and seventh pleas, and that the parties plead and reply over. Whereupon the defendant declining to plead further the

67 plaintiff joined issue upon the said sixth and seventh pleas in short by consent.

PATRICK G. MEATH
vs.
THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS. } 2617.

This cause came on this day to be heard upon the agreement of counsel waiving a jury and submitting the issues joined herein for the determination of the court, and the court having heard the evidence upon the 6th and 7th pleas of defendant and the replications thereto, and joinders in issue, and arguments of counsel, finds said issues in favor of defendants, and that plaintiff's right of action when this suit was brought was barred by the statute of limitations, and now files the findings of fact in the cause and the conclusions of law reached.

It is therefore considered by the court that defendant go hence without day and recover of the plaintiff the costs of this cause to be taxed, for which execution may issue.

68 PATRICK G. MEATH
vs.
THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS. } 2617.

In accordance with the agreement of counsel, this cause was submitted to the court upon the sixth and seventh pleas interposing the defence of the statute of limitations, and upon the evidence adduced the court finds the following to be the facts: On the 26th day of March, 1877, plaintiff brought in the circuit court of the United States for the southern district of Mississippi, against defendants, his action, No. 2472, of covenant upon the contract set out in and exhibited with the declaration in this cause, accompanied with the bill of particulars of his damages now claimed and exhibited, the two actions being identical, and the declaration and bill of particulars in the words and figures following:

THE UNITED STATES OF AMERICA,
So. District of Mississippi:

In the circuit court in and for the said southern district, at the May term thereof, A. D. 1877.

Patrick G. Meath, a citizen of the State of Tennessee, by his attorney, complains of the Board of Levee Commissioners for the counties
69 of Bolivar, Washington, and Issaquena *Issaquena*, a corporation of the State of Mississippi, domiciled in the county of Washington, in said district, defendants, in a plea of covenant broken, for that whereas heretofore, to wit, on the 13th day of August, A. D. 1869, at, to wit, the district aforesaid, the said defendants, by their then president, J. E. Edwards, entered into, executed, and delivered their covenant in writing under seal with the plaintiff and one Martin Keary, who is a citizen of the said State of Mississippi and not joined in this action, because to do so would oust the jurisdiction of this court, which is now here to the court shown, whereby plaintiff and said Keary covenanted and agreed to construct and finish in the most substantial and workmanlike manner to the satis-

faction and acceptance of the chief engineer of said defendants, all the graduation, piling, and such other work as may be required on sections of the levee under the jurisdiction and control of defendants, named Skipwiths, Cammack, Christmas, and Gibson's levees in Issaquena County, in said district, the said work to be finished as described in the specifications
70 embraced in said covenant and agreeably to the directions from time to time of the said engineer, on or before the 1st day of April, A. D. 1871. For which said work so to be done and performed, the said defendants covenanted and agreed in and by said covenant to pay to plaintiff and said Keary as follows, to wit, sixty-nine and $\frac{3}{4}$ cents per cubic yard for the work done on the Cammack levee, with one-sixth added for shrinkage, making $80\frac{5}{24}$ cents per cubic yard, and for the work done on the Skipwiths, Christmas, and Gibson levees (47) forty-seven cents per cubic yard, with one-sixth added for shrinkage, making $54\frac{5}{6}$ cents per cubic yard; and for breaking surface, fifteen dollars per acre, and for heavy grubbing and clearing, one hundred and fifty dollars per acre, and for light grubbing and clearing, forty dollars per acre; the pay for said work, as well as the other to be hereinafter mentioned to be in coupon bonds of said defendants, bearing interest at ten per cent. per annum and maturing on the first day of January, A. D. 1876, which bonds were then worth a large sum of money, to wit, the sum of eighty cents on the dollar.

And for that the plaintiff, with said Keary, was required by
71 the said engineer in accordance with said covenant to do the following work, to wit, 800,000 cubic yards of graduation and piling on the said Cammack levee, 300,000 cubic yards on the said Christmas levee, 80,000 cubic yards on the said Gibson levee, and 120,000 cubic yards on the said Skipwith levee; and to do 130 acres of surface breaking at fifteen dollars per acre, and one hundred and nineteen acres of heavy clearing and grubbing at the price of one hundred and fifty dollars per acre, and forty-six acres of light grubbing and clearing, at forty dollars per acre, and also to do 114,066 cubic yards of graduation and piling on protection levees at the price and sum of sixty-nine $\frac{3}{4}$ cents per cubic yard with one-sixth added for shrinkage, making $80\frac{5}{24}$ cents per cubic yard.

And the plaintiff avers, that in order to perform said work according to said contract and agreement, and relying wholly upon and trusting to the same, he employed, at great cost and expense, in the different cities of the United States, a large number of laborers, to wit, 800, at a cost of about two and a half dollars per day; purchased a complete outfit
72 for carrying on and performing said work, consisting of to 1,200 wheelbarrows, 600 double mattrasses, 101,000 feet of wheeling-plank, 800 pairs of double-blankets, 100 dozen Ames' shovels, 16 large boilers, 10 small boilers, 100 dozen tin plates, 100 doz. tin cups, 100 dozen knives, 100 dozen forks, 5 doz. Collins' axes, $\frac{1}{2}$ doz. coffee-mills, 2 dozen large tin dishes, 6 doz. sheet-iron pans, $\frac{1}{2}$ dozen tin horns, $\frac{1}{2}$ dozen hand-saws, 3 large cross-cut saws, $\frac{1}{2}$ dozen flesh-forks, one lot of augers, one lot of tap-borers, 3 dozen water-buckets, large scrapers, steel-shod, the total cost thereof being a large amount, to wit, the sum of sixteen thousand dollars. That as a part of said outfit he purchased five kegs of nails of of the value of thirty-seven $\frac{50}{100}$ dollars, 25 double setts of scraper harness with chains, back and hip straps, collars and harness, worth one

hundred and seventy-five dollars; two wagons, one cart and harness, six mules, worth $1,800, and a large quantity of subsistence stores, worth, to wit, the sum of $35,000, and transported all of the said tools and implements, stock, wagons, outfit, supplies to the said levee-work at large, to wit, the sum of ten thousand dollars; that he constructed for the
73 use of said laborers the necessary cabins, cook-houses and bake-ovens along the said levees at a large cost, to wit, the sum of $1,821, and without said covenant he never would have incurred said expense. And the plaintiff avers that the preparation and purchases aforesaid were made upon the faith of said covenant, and were necessary to enable him to perform the said work as he had covenanted and agreed to do. And being thus prepared to do said work according to the terms of said covenant, plaintiff began the same on or about the 9th day of September, A. D. 1869, and from that time until about, to wit, the 25 day of January, A. D. 1871, he did a large amount of said work according to the said covenant and agreement, to wit, all of the Skipwith levee, 111,267 cubic yards of the Cammack levee, 24,250 cubic yards of the Christmas levee, 39 acres of heavy grubbing and clearing, 21 acres of light grubbing and clearing, 30 acres of surface breaking, and 112,697 cubic yards of protection levee, and for said work so done by him the said defendants are justly indebted to him in a large sum of money yet unpaid, to wit, the sum of sixty-five thousand four hundred and eighty-two dollars.

74 And the said plaintiff further avers that he was at all times ready, willing, and able to do and complete the balance of said levee work so covenanted to be done and performed, according to the terms and tenor of the said covenant, and the balance of said work so to be done would have yielded him, as the benefit to be derived under said covenant and agreement, a large sum of money, to wit, $368,623, that being the difference between the actual cost in cash of doing said work, and the price which defendants covenanted and agreed to pay for the same; the actual cost of graduation and piling being twenty cents per cubic yard, and the contract price for the Cammack *levy* 81⅜ cents per cubic yard, payable in the bonds of defendant due in 1876, then worth eighty cents on the dollar, and the contract price of the Gibson, Christmas, and Skipwith's levees being 54⅝ cents per cubic yard, payable in the same bonds, and the cost of surface breaking in cash being $5 per acre and contract price $15 per acre; of light grubbing and clearing 15$ per acre cash, and contract price $40
75 per acre, and heavy grubbing and clearing 40$ per acre and contract price 150$ per acre.

And plaintiff further avers that while he was actually engaged in the said levee work so covenanted to be done and performed by him, with ample means to accomplish and complete the whole of the said work, the said defendants, without any fault or negligence on his part, and against his wishes and consent, to wit, on the 10th day of January, 1870, at the district aforesaid, ordered all further work on the said Cammack levee to be done by plaintiff and for which the defendants had covenanted and agreed to pay as aforesaid to be suspended, and notified and coerced plaintiff to desist from further work on said levee; and then and there forced and prevented pl'ff from completing the said work on said levee until further orders. And the plaintiff says that he was ready, able, and willing and desirous of doing said work and kept and detained all his outfit on said work

awaiting orders to commence the same again, and so continued for a long time thereafter, to wit, until the 1st day of April, A. D. 1871, but was prevented from so doing by the wrongful acts of defendants. And
76 the plaintiff further says that the said Martin Keary has no real interest in this suit, having assigned and set over to plaintiff all his interest, right, and title in and to said covenant on the 17 Feb'y, 1870, for the consideration of six thousand five hundred dollars with the knowledge and consent of defendants.

Whereby and by reason of the premises, the plaintiff suffered great loss and damage in not being permitted to complete the said work and derive the great benefit secured by said contract, to wit, the said sum of $368,623; that he lost the further sum of ten thousand dollars on supplies and outfit; the sum of ten thousand dollars loss on the cost of transportation of labor, supplies, and outfit, to the work; and the sum of ten thousand dollars on account of his hands being unemployed; and that defendants are justly indebted to him a balance for work done by him in a large sum of money, to wit, the sum of $65,282. Notwithstanding which, the defendants, though often requested so to do, have hitherto wholly failed and refused, and still fail and refuse to pay to pl'ff the whole or any part
77 of the said several sums of money, to plaintiff's damage $500,000, and therefore he sues.

NUGENT & McWILLIE

(For bill of particulars see Exhibit B, page 18, of this record.)

To said suit so brought the defendants in their ninth plea alleges that the plaintiff, upon the commencement of this suit, was adjudicated a bankrupt on his own petition by the district court of the United States sitting at Memphis, Tennessee, in bankruptcy, and that an assignment of his estate was made to his assignee in bankruptcy duly appointed, whereby the right of action upon the covenant sued on passed to said assignee, said ninth plea being in the words and figures following:

IX. And for a further plea in this behalf the said defendant, by special leave of court, by his attorneys comes and says that the plaintiff ought not to have and maintain his said suit, because said plaintiff was, before the commencement of this suit, duly adjudicated a bankrupt by the United States district court for the western district of Tennessee, and before the commencement of this suit an assignee in bankruptcy of his said
78 estate was duly appointed by said United States district court, whereby the said claim sued on and the right of action on said alleged bond sued on passed by operation of law to said assignee; all which defendant is ready to verify, wherefore defendant prays judgment, &c.

W. A. PERCY &
FRANK JOHNSTON,
For Def't.

To this plea plaintiff replied that the claim against and contract with defendants and the chose in action in that behalf were, on the 25th day of November, 1876, sold by Oscar Wooldridge, assignee in bankruptcy of plaintiff, in pursuance of the bankrupt law, and as required by law, and purchased by one Thomas Boyle for plaintiff; that said assignee made an assignment to said Boyle, who, on the day of January, 1877, made, executed, and delivered to plaintiff his assignment thereof according to the

tenor of his agreement; the said replication being in the words and figures following, to wit:

4. And for replication to defendants ninth plea, plaintiff says, preclude non, because he says that the said claim against and contract with
79 defendants, and the chose in action in that behalf were, on the 23d day of November, 1876, sold by Oscar Wooldridge, his assignee in bankruptcy, in the State of Tennessee, in pursuance of the bankrupt law, and as required by law, and purchased by one Thomas Boyle for plaintiff, and that the said assignee made, executed, and delivered to said Boyle a bill of sale thereto, and the said Boyle afterwards, to wit, on the day of January, 1877, made, executed, and delivered to plaintiff his assignment thereof according to the tenor of his agreement with plaintiff, and this plaintiff is ready to verify, wherefore, &c.

Issue in short on this replication by consent.

PERCY & FRANK JOHNSTON,
NUGENT & McWILLIE, *P. Q.*

Issue in short was taken upon said replication, and on the trial the following papers were read:

First. A bill of sale to Boyle by Wooldridge, in the words and figures following, to wit:

In the district court of the United States for the western district of Tennessee.

IN THE MATTER OF P. G. MEATH, BANKRUPT. } In bankruptcy, at Memphis, Tenn.

Assignee's bill of sale.

80 WESTERN DISTRICT OF TENNESSEE, *ss:*

Whereas, by virtue of the power in me vested as the duly appointed, approved, and acting assignee in bankruptcy of said bankrupt's estate, I did, on the 23d day of November, 1876, after the time and place of sale had been duly and legally advertised as required by the bankrupt act and rules of said court, proceed to sell at public sale to the highest bidder, for cash, the personal property of said bankrupt hereinafter described.

And whereas Thomas Boyle was the highest and best bidder at said sale and became the purchaser of said property:

Now, therefore, I, Oscar Wooldridge, as assignee aforesaid, for and in consideration of the sum of five dollars to me in hand paid, the receipt whereof is hereby acknowledged, the same being the amount by him bid at said sale therefore, do hereby bargain, sell, transfer, and assign, without recourse in any event upon me, unto the said Thomas Boyle and to his assigns forever, all the interest, legal and equitable, which the said bankrupt had on the 6th day of March, A. D. 1875, the date of the filing of his petition in bankruptcy, in and to the personal property and
81 effects of said bankrupt, described as follows, viz, claim for damages and breach of contract and disputed estimates on levee work

against Bolivar, Washington, and Issaquena Counties, Miss., amounting to $450,000.00.

This is a copy of the bill of sale, made to Thomas Boyle, as shown from my sales-book, &c.

Memphis, Feb'y 7, 1878.—O. WOOLDRIDGE, *Assignee.*

O. WOOLDRIDGE,
Assignee of said Bankrupt's Estate.

Subscribed and sworn to before me Feb'y 7, 1878.

T. J. LATHAM,
Register in Bankruptcy, Dist. West. Tenn.

Second. An agreement between Boyle and Meath, in the words and figures following, to wit:

P. G. MEATH
vs.
ISSAQUENA COUNTY, MISS.

Pending in the chancery court of said county, Miss., and also in the Federal court at Jackson, Miss., in the name of the Emmet Bank vs. the same county.

At the bankrupt sale of P. G. Meath, by Oscar Wooldridge
82 assignee in bankruptcy of said Meath, Tho's Boyle, for said Meath, bidd off his claim vs. Issaquena County, Miss., his claim vs. Phillips Co., Ark., and various other claims. Said Boyle is to be fully reimbursed out of the property bid off for the outlay by him in that behalf. He is not desirous of incurring expense in the presentation of those claims, but is willing that said Meath, who is the real beneficiary, subject to the right of said Boyle to be reimbursed, may carry on said litigation.

Now, with this understanding said Boyle furnishes said Meath with copies of his bill of sale for the Issaquena County claim, and fully authorizes said Meath, at his (Meath's) expense, however, to use his (Boyle's) name in carrying on the suit at Issaquena ch'y court and in the Federal court at Jackson, Miss., and wherever else it may be necessary. The said Boyle in no manner to be liable for fees of counsel or for costs. The proceeds recovered are to be subject to the repayment of all outlays of said Boyle for said Meath, the balance to be the property of said Meath.

In regard to the Phillips County claim, the said Meath in the
83 same way, and subject to the same equities, may carry on all necessary litigation in his name for the use of said Boyle. The suit of Meath vs. Lewison & McNeal, in the ch'y court of Shelby County, may be carried on in said Meath's name, subject to the same equities and in the same way. If as to the Issaquena claim it is preferred, the suit may be carried on in the said Meath's name, for the use of said Boyle, subject to the understanding contained in this paper.

Jan'y 16, 1877.

P. G. MEATH.
THO'S BOYLE.

A true copy of the original, as this day carefully compared by me. Witness my hand and seal this January 28, 1878.

HOUSDON CARY,
Commissioner of the State of Miss., and U. S. Commissioner, Dist. of West. Tenn.

Third. An assignment from Boyle to Meath, in the words and figures following:

(See exhibit filed with declaration on page 39 of this record.)

Fourth. Adjudication in bankruptcy of Meath, in words and figures following:

84 In the district court of the United States for the western district of Tennessee.

IN THE MATTER OF P. G. MEATH, BY WHOM A PETITION FOR ADJUDICATION of bankruptcy was filed on the 9th day of Feb'y, A. D. 1875.	In bankruptcy.

At Memphis, in said district, on the 17th day of Feb'y, A. D. 1875, before T. J. Latham, register in bankruptcy for said district.

WESTERN DISTRICT OF TENNESSEE, *ss:*

I, T. J. Latham, register in bankruptcy for said western district of Tennessee, upon good proof before me taken, do find that the said P. G. Meath has become a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; and I do hereby declare and adjudge him a bankrupt.

Witness T. J. Latham, register in bankruptcy for said district, at Memphis, on the 17 day of Feb'y, A. D. 1875.

T. J. LATHAM,
Register in Bankruptcy for said District.

85 It was also shown that said Boyle had purchased the claim now in controversy for plaintiff; that an assignment of such claim had been duly made to Oscar Wooldridge, assignee of plaintiff, duly appointed, and that the bill of sale by Boyle to Meath, though antedated, had been in fact executed upon the day of its acknowledgment.

On this state of facts the court found that plaintiff did not have the legal title to the claim sued on when the action was commenced, and gave judgment in the words and figures following:

PATRICK G. MEATH *vs.* THE BOARD OF LEVEE COMMISSIONERS.	2472.

This cause having been submitted to the court under a written stipulation of the parties litigant, plaintiff and defendant, signed by the said parties by their respective attorneys of record, waiving a jury and submitting the cause on the evidence and the law, and the court having heard all

the evidence in the cause and the argument of the respective counsel
86 for the said parties, now finds the issue joined between the parties on the ninth plea and the replication and joinder in issue thereon, in favor of the defendant; it is accordingly adjudged by the court that the defendant go hence without day and recover from the said plaintiff his costs in this behalf, to be taxed, for which execution may issue, &c. This judgment was rendered and enrolled on the 5th day of April, 1878, at the March special term of said court. Subsequently and at the same time plaintiff moved the court to set aside the judgment and for leave to amend his pleadings so that the same might run in the name of Thomas Boyle, for his use, both parties being citizens of the State of Tennessee, but the court overruled said motion.

On the 21st day of December, 1878, plaintiff brought this present action, and has paid all the costs of the former suit. On the issue made up on the 6th and 7th pleas filed in the present suit all the foregoing facts were proven, and in addition the order of the bankrupt court in Tennessee for the sale of assets in bankruptcy was read in the words and figures following:

87 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the district court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun at the United States court-house in the city of Memphis, in said district, on, to wit, the 18th day of December, A. D. 1868.

Order in bankruptcy.

Ordered, that hereafter in all cases in bankruptcy where assets, either real or personal, have come into the hands of the assignee unencumbered, the assignee may proceed to sell the same in accordance with the provisions of the act and general rules, without special order therefor in each case. And it is further ordered that in all cases where the fees have been, or may be limited to $50.00 by order of the court, if the assignee shall realize any fund from the sale of assets or otherwise, belonging to such estate, he shall apply the same to the payment of the full amount of costs and fees
88 due therein, to the several officers of the bankrupt court.

I, Horace E. Andrews, clerk of the U. S. district court for the western district of Tennessee, do hereby certify that the foregoing is a true and complete copy of the original b'k'pt order of Dec., 1868, as the same appears of record and on the files in said court.

Witness my signature and seal of said court this 29 day of May, 1878.

H. E. ANDREWS, *Clk,*
By L. H. P. MABRY, *D. C.*

This was all the evidence adduced upon said issues, and thereupon it was insisted for plaintiff, that under section 2163, revised code 1871, State

of Mississippi, that plaintiff had the right to commence this suit within one year after the termination of the former suit, to wit, April 5, 1878; but the converse of the proposition was contended for by defendant, and the court here now finds as matter of law arising upon the foregoing facts, that the plaintiff did not have such right; that the present suit cannot be connected with the former suit, under said section of said code, so as
89 to save the bar of the statute of limitations, but is to be considered as a separate and independent suit, and that as seven years had elapsed before the present suit was brought, and after plaintiff's right of action accrued, to wit, on the 1st day of April, 1878, the plaintiff's right of action was barred by limitation. To which conclusions of law plaintiff then and there in open court instantly excepted, and his exception was allowed. All of which findings of fact and conclusions of law are certified under seal, and ordered to be spread on the minutes of this court as part of the record of this cause, this 10th day of February, A. D. 1880.

R. A. HILL, [SEAL.]
Judge, &c.

90 In the circuit court of the United States for the southern district of Mississippi.

PATRICK G. MEATH, PLAINTIFF,
vs.
THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS, DEFENDANTS. } 2617.

To the Hon. R. A. Hill, judge, &c.:

The petition of Patrick G. Meath respectfully represents that he feels aggrieved by the final judgment rendered for defendants in the above-entitled cause, on the 10th day of February, A. D. 1880, and to the end that the same may be reviewed, prays writ of error herein to the next term of the Supreme Court of the United States, to be holden at Washington City on the second Monday in October next, herewith tendering bond for approval. And as in duty bound he will ever pray, &c.

PATRICK G. MEATH,
By NUGENT & McWILLIE, *Att's.*

To the clerk of the circuit court of the United States for the southern district of Mississippi:

Upon the plaintiff filing the accompanying bond, you will issue the writ of error as prayed.

R. A. HILL, *Judge, &c.*

(Indorsed:) 2617. Patrick G. Meath vs. The Board of Miss. Levee Com's. Petition for writ of error.

91 In the circuit court of the United States for the southern district of Mississippi.

PATRICK G. MEATH
vs.
THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS. } 2617.

Know all men by these presents, that we, Patrick G. Meath and Will-

iam L. Nugent and Thomas A. McWillie, are held and firmly bound unto The Board of Mississippi Levee Commissioners in the penal sum of five hundred dollars, to the payment of which, well and truly to be made, we bind ourselves, and each of us, jointly & severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 2d day of August, A. D. 1880. Whereas the above-bound Meath hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action, on the 10th day of February, A. D. 1880, in favor of defendants, by the circuit court of the United States for the southern district of Mississippi: Now, therefore, the condition of this obligation is such, that if the above-bound Meath shall prosecute his said writ of error to to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

P. G. MEATH. [L. S.]
WM. L. NUGENT. [L. S.]
THOS. A. McWILLIE. [L. S.]

I approve this bond.

R. A. HILL, *Judge, &c.*

(Indorsed:) 2617. Patrick G. Meath vs. The Board of Miss. Levee Com's. Writ of error. Bond.

92 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the southern district of Mississippi, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Patrick G. Meath, plaintiff, and the Board of Mississippi Levee Commissioners, defendants, a manifest error hath happened to the great damage of the said Patrick G. Meath, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh (7th) day of August, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.]

JAS. M. McKEE,
Clerk of the Circuit Court of the United States for the Southern District of Mississippi.

Allowed by—

93 UNITED STATES OF AMERICA, *ss:*

To the Board of Mississippi Levee Commissioners, or Frank Johnston, esq., their attorney of record:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern d'tr't of Mississippi, wherein Patrick G. Meath is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 3 day of August, A. D. 1880.

[SEAL.] R. A. HILL,
Judge of the District Court of the United States for the State of Mississippi, and pres'd'g as Cir't Judge.

We acknowledge service of above citation by copy thereof received this 7th day of August, A. D. 1880.

FRANK JOHNSTON,
Attor'y for Deft.

94 UNITED STATES OF AMERICA,
Southern District of Mississippi:

Personally appeared before me, the undersigned, clerk of the circuit court of the United States for the southern district of Mississippi, Thomas A. McWillie, one of the attorneys of record of the within-named plaintiff in error, Patrick G. Meath, who being duly sworn, deposes and says that on this 7th day of August, A. D. 1880, he duly delivered to Frank Johnston, esq., attorney of record of the defendants in error, The Board of Mississippi Levee Commissioners, a true copy of the within writ of citation.

THOS. A. McWILLIE.

Sworn to and subscribed before me this 7th day of August, A. D. 1880.

JAS. M. McKEE,
Clerk U. S. Circuit Court, So. Dist. of Miss.

(Indorsed:) 2617. Patrick G. Meath vs. The Board of Miss. Levee Com'rs. Citation in error.

95 UNITED STATES OF AMERICA,
Southern District of Mississippi:

I, Jas. M. McKee, clerk of the circuit court of the United States for the southern district of Mississippi, hereby certify that the preceding annexed ninety-three pages do contain a true and complete transcript of the record of said court in the cause therein stated as the same now remains in our said court.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at office in Jackson, in said district, this 7th day of August, A. D. 1880.

[SEAL.] JAS. M. McKEE. *Clerk.*

(Indorsement on cover:) No. 102. Patrick G. Meath, plaintiff in error, vs. The Board of Mississippi Levee Commissioners. S. Mississippi C. C. U. S. Filed October 11, 1880.)

109-268

OFFICE SUPREME COURT U. S.
FILED
NOV 1 1883
JAMES H. McKENNEY, CLK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883—No. 102.

P. G. MEATH,

Plaintiff in Error.

VS.

THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS.

BRIEF FOR PLAINTIFF IN ERROR.

S. P. WALKER,
Attorney.

MEMPHIS, TENN.
Jones, Huhn & Co., Printers and Binders, 12 Jefferson Street.
1883.

93 UNITED STATES OF AMERICA, *ss:*

To the Board of Mississippi Levee Commissioners, or Frank Johnston, esq., their attorney of record:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern d'tr't of Mississippi, wherein Patrick G. Meath is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 3 day of August, A. D. 1880.

[SEAL.] R. A. HILL,
Judge of the District Court of the United States for the State of Mississippi, and pres'd'g as Cir't Judge.

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Personally appeared before me, the undersigned, clerk of the circuit court of the United States for the southern district of Mississippi, Thomas A. McWillie, one of the attorneys of record of the within-named plaintiff in error, Patrick G. Meath, who being duly sworn, deposes and says that on this 7th day of August, A. D. 1880, he duly delivered to Frank Johnston, esq., attorney of record of the defendants in error, The Board of Mississippi Levee Commissioners, a true copy of the within writ of citation.

THOS. A. McWILLIE.

Sworn to and subscribed before me this 7th day of August, A. D. 1880.

JAS. M. McKEE,
Clerk U. S. Circuit Court, So. Dist. of Miss.

(Indorsed:) 2617. Patrick G. Meath vs. The Board of Miss. Levee Com'rs. Citation in error.

95 UNITED STATES OF AMERICA,
Southern District of Mississippi:

I, Jas. M. McKee, clerk of the circuit court of the United States for the southern district of Mississippi, hereby certify that the preceding annexed ninety-three pages do contain a true and complete transcript of the record of said court in the cause therein stated as the same now remains in our said court.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at office in Jackson, in said district, this 7th day of August, A. D. 1880.

[SEAL.] JAS. M. McKEE. *Clerk.*

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MEMPHIS, TENN.
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1883.

tiff at any time within seven years next preceding the commencement of this suit."

Trans. 20.

The seventh plea was a special plea of the statute of limitations. The plaintiff had, in his declaration averred (page 4, Trans.) that there had been a former suit by him against the defendant, on the same cause of action; that that suit had been defeated on a matter of form only, and that the present suit had been commenced within a year after its determination. The defendant by its seventh plea, set up the facts with regard to the former suit; denied that it was determined against the plaintiff "for matter of form" only; averred that it so determined on "matter of substance," and concluded by again averring that "the present action was not brought within seven years after the cause of action accrued," and was therefore barred by the statute.

Trans. 21.

The plaintiff demurred to the sixth plea upon the grounds, (1) that the declaration having stated a former suit brought within seven years, that suit dismissed for formal defects, and the present suit brought within a year from the dismissal, the general plea of the statute of seven years was bad; (2) that the seven years statute as to sealed instruments was not passed until April 19th, 1873; and (3) that the plea was not good to the present action.

Trans. 23.

To the seventh plea plaintiff demurred, on the grounds (1) that it presented no answer to the declaration; (2) that it was informal, and insufficient; (3) that it did not allege that the right of action was barred when the first suit was begun; and (4) "for other causes to be assigned."

Trans. 24.

The demurrers were overruled (Trans. 25) and plaintiff filed replications to said sixth and seventh pleas, the one being the general and the other the special plea of the statute of limitations.

Trans. 24.

By a written stipulation (Trans. 24–5) the parties waived a jury and submitted the issues thus made up to the court. In that stipulation it is recited that the court, after argument of the demurrers, had "expressed the opinion that the pending of the former suit could not be availed of to prevent the bar of the statute of limitations, and that this action is barred by limitation," and hence it was agreed that that sole question shall be presented on "the pleadings and proof, and that only such evidence as in the judgment of the court bears upon that issue shall be incorporated in its findings, and presented to the Supreme Court of the United States; and that the record for said court shall consist of the pleadings *and exhibits*, the orders of the court, the findings of fact and law in the cause, and this agreement;" and further, "that should the Supreme Court differ in opinion with and reverse the Circuit Court, the cause shall be remanded for trial on its merits on all the other questions in the case."

Judgment was entered in favor of defendants, sustaining the pleas of the statute of limitations; and in accordance with the stipulation, the court filed special findings of the facts upon which that judgment was founded.

Trans. 26–33.

It was found that on the 26th day of March, 1877, the plaintiff had commenced suit against the defendant Levee Board in the United States Circuit Court for the Southern District of Mississippi, on the same causes of action here sued on; and as part of the findings, so much of that record as was necessary to show the grounds upon which that case was determined against the plaintiff is set out at large, viz: The declaration, plea, replication and joinder of issue, so much of the evidence as bore upon that issue, and the judgment of the court thereon. There was no other evidence.

Trans. 33.

One of the findings is to the effect that the former suit was determined against the plaintiff on the ground that he "did not have the legal title to the claim sued on when the action was commenced."

Trans. 32.

The present action was commenced within a year from that determination. But the court below was of opinion that this action was barred by the statute of limitations; that the former suit could not be looked to to save the bar of the statute, under section 2163 Code of Mississippi, of 1871, and gave judgment accordingly.

ASSIGNMENT OF ERRORS.

The plaintiff assigns the errors following, viz:

First—That the court below erred in holding that the present action (without regard to the former suit) was barred by the statute of limitations.

Second—That the findings of facts in the court below are so imperfect and defective as to necessitate a reversal of the judgment below, and remanding the cause for a *venire de novo.*

Third—That it erred in holding that the facts found did not save the bar of the statute under the Code of Mississppi, section 2163.

BRIEF.

I.

The declaration and exhibits thereto must be looked to in order to determine any date at all for the accrual of the plaintiff's rights of action, from which it appears that the plaintiff contracted to finish the work of constructing the levees on or before the first day of April, 1871; that so much of the work as was actually done, was finished before that date; and that for all the work to be done under the contract, the defendant Board agreed to pay in coupon bonds, *maturing on the first day of January,* 1876. There was an express and absolute stipulation for credit to the defendant. No action of *indebitatus assumpsit* would lie until the expiration of the time of credit.

Hanna v. Wills, 21 Wend., 90.
Gale v. Coddington, Ib., 175.
Mussen v. Price, 4 East., 147.
Parslow v. Dearlove, Ib., 438.

Hoskins v. Duperoy, 9 East., 498.
Cothay v. Murray, 1 Camp., 335.
Hutchinson v. Reid, 3 Camp., 329.
Dutton v. Solomonson, 3 Bos. & Pull., 582.

And therefore the statute of limitations would, in no event, begin to run in this case until the first day of January, 1876.

II.

From the Code of Mississippi of 1871 (which took effect October 1st, 1871,) down to the Act of April 19th, 1873, that State had no statute of limitations applicable to instruments under seal; and as to pre-existing causes of action, the Act of April 19th, 1873, began to run only from the time of its passage. The plaintiff's demurrer to the pleas, setting up the lapse of more than seven years from the accrual of the cause of action, should have been sustained.

Furlong v. The State, 58 Miss., 717.

III.

The declaration and contract filed as an exhibit with it, could not enable the court to say definitely when the plaintiff's right of action accrued. The date of the accrual of a right of action to either party would depend upon the date of the performance of the work, or the happening of a breach, and could not be arrived at from the date or terms of the contract, without more. Other considerations necessarily enter into the determination of that question. As to the date of the accrual of the right of action, therefore, the findings in the court below are fatally defective. The judgment should be reversed and a new trial ordered.

Barnes v. Williams, 11 Wheat., 415.
Prentice v. Zanes, Administrator, 8 How., 470.
Graham v. Bayne, 18 How., 60.
Burr v. Des Moines Co., 1 Wall., 99.

IV.

The former suit was disposed of on the ground that the plaintiff—though he had an imperfect or equitable title—had not a legal title to the cause of action sued on; and this suit was begun within a year after its disposition, thus saving the bar of the statute, if it would otherwise have been complete.

Section 2163, Code of Miss., of 1871.
M. & C. R. R. Co., v. Orr, 52 Miss., 541.
Pillow v. M. & C. R. R. Co., 9 Heisk., 248.
Coffin vs. Cottle, 16 Pick., 386.
Woods vs. Houghton, 1 Gray, 580.
Gibbons vs. Robins, 11 Ala., 156.
Caldwell vs. Harding, 1 Lowell, 326.

ARGUMENT.

Whether correctly or not, it is plain that the trial court assumed that the declaration itself determined that the action sued on accrued to the plaintiff not later than April 1st, 1871, and that the case turned solely on the question, whether the plaintiff had succeeded in bringing himself within the provisions of Section 2163, *supra*, of the Code of Mississippi.

The pleadings presented two issues:

First—Did the right of action accrue more than seven years before the bringing of this suit?

Second—If it did, had the plaintiff succeeded in showing a former suit, brought within the prescribed period, and disposed of "for matter of form" only?

The second question would not arise unless the first one was determined against the plaintiff; and to determine the first question, it was necessary that the court should adjudicate whether any, and if any, what statute of limitations was applicable to the case; and (having determined what period was necessary to form the bar), to find the facts necessary to determine the date of the accrual of the right of action.

If our reading of the case of Furlong v. The State, *supra*,

is right, it settles the proposition that, as matter of law, the Code of 1871, which took effect October 1st, 1871, repealed the provisions of the Code of 1857 as to the limitation of actions on sealed instruments; and that from the 1st of October, 1871, down to the 19th day of April, 1873, the State of Mississippi had no statute of limitations applicable to such actions.

This court will implicitly follow the Supreme Court of Mississippi in its rulings on the statute of limitations of that State; and the action having been commenced on the 21st of December, 1878, the demurrer of plaintiff to both pleas should have been sustained. But let us assume that the pleas were sufficient, if true—that is to say, let it be conceded for the sake of the argument, that if it should turn out at the trial that the plaintiff's right of action accrued more than seven years before suit was brought, the bar of the statute would be complete—the question remained, when did the right of action accrue?

The declaration showed that the contract sued on was made on the 13th of August, 1869; that the plaintiff stipulated to complete the levees on or before the 1st day of April, 1871; that the plaintiff worked under the contract until about the 25th day of February, 1871; that he retained his force of laborers and outfit on the line of the work, until April 1st, 1871, ready and willing to perform the contract on his part; and that he was prevented from a complete performance by the refusal of the defendant Board to permit him to proceed. It further showed *that the entire work was to be paid for in coupon bonds, bearing ten per cent. interest, payable annually, and maturing on the 1st day of January*, 1876. Could the court have correctly ruled that the declaration on its face showed that the right of action accrued more than seven years before the 21st of December, 1878? The authorities cited under the first point of our brief establish, as we submit, that on the facts stated the plaintiff could not have maintained an action for work and labor done, and material furnished, until after the 1st day of January, 1876. Prior to that date, he could have maintained an action averring the contract; its performance on his part; that he had demanded, and that defendants had refused

to deliver the bonds as stipulated; and in such action, he could only have recovered *the damages suffered by reason of that refusal.* The measure of damages in such an action would ordinarily be the face value of the obligation agreed to be delivered, reduced to present value by proper discount. In a case of this kind, the obligations to be delivered being public or quasi-public securities, the damages would probably be measured by their market value at the date of the refusal to deliver.

City of Memphis vs. Brown, 20 Wall., 289.

But it is not material to pursue that inquiry. This action, in the aspect in which we are now dealing with it, is in *assumpsit*—the plaintiff declares that the defendant is "indebted to him in a large sum of money,"—and it certainly cannot be held to be barred by limitation, upon the ground that another action of a wholly different character, viz: an action on the case to recover damages for refusal to deliver certain securities, might have been brought at a date more than seven years anterior to the commencement of this action. We say "might have been brought" intentionally; *for there is neither averment nor finding to show that the plaintiff ever did demand, or the defendant refuse to deliver the bonds stipulated for.*

Our theory is that in this character of case, the plaintiff had two alternatives open to him. He might (say on the 2d day of April, 1871), have demanded the bonds for the balance due to him, and if the defendant refused to deliver them, he might have maintained a special action to recover the damages for that refusal. In such an action, he must have proved the demand and refusal; for without that, he could not recover. And quite different considerations would govern and control the results in such action than would obtain if the other alternative were adopted. On the other hand, it was entirely open to the plaintiff *to proceed in every respect as if the bonds agreed to be delivered had been actually delivered.* When the first coupon would have matured, he might have sued for so much, and so on, for each installment of interest as it would have matured,

and on the 1st day of January, 1876, he might have sued for the principal sum due him.

On this theory, neither interest nor principal would be barred by a seven years statute. So far as appears, the plaintiff adopted that theory. At all events, this action cannot be defeated on the idea that he might have demanded the bonds; and that if he had demanded them, and if the Levee Board had refused to deliver them, he would have had a right of action, of another character, against them. On any possible theory of the case, the defendant, to sustain the defence of the statute of limitations, must have shown, and the court must have found that the plaintiff, *more than seven years before suit brought*, had demanded and defendant had refused to deliver the bonds stipulated for. There was no such evidence, and no such finding.

The plaintiff sued both for the balance due him for the work actually done, and for the damages suffered by the refusal to permit its completion. Of course, we concede that the proposition that we are here urging will, if sustained, apply to and control only the former aspect of the case.

By the third point of our brief, we submit that the special findings in the court below are not sufficient to support the judgment of that court. The trial judge was of course not bound to conform to the stipulation that the facts should be specially found under the act of March 3, 1865, (Rev. Stat. 649–700). It was for him to determine whether he would find generally for the one party or the other, or, whether he would make a special finding of the facts equivalent to a special verdict by a jury. He chose to adopt the latter course, and the sufficiency of his findings must be tested by the rules applicable to special verdicts, so often laid down in this court.

What are the essentials of a special verdict, special findings, or an agreed statement of facts in lieu of either, has been often before this court. "If a special verdict be ambiguous or imperfect; if it find but the evidence of facts, and not the facts themselves, or find but part of the facts in issue and is silent as

to others, it is a mistrial, and the court of errors must order a *venire de novo.*"

Graham vs. Bayne, 18 How., 60–63.

"The statement must be sufficient in itself without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case."

Burr vs. DesMoines Co., 1 Wall., 99–102.

And in *Barnes vs. Williams*, 11 *Wheaton*, 415, where a special verdict was rendered in the court below, this court reversed the judgment below, and remanded the cause for a new trial, because, (1) the plaintiff, claiming a bequest, the special verdict failed to show the executor's assent thereto; and (2) because "as to defendant's defence under the statute of limitations, the special verdict did not find any facts by which the court could ascertain at what time the right of action accrued."

The findings in this case are obnoxious to almost every objection pointed out by this court in the decisions above referred to.

First—They largely consist of the evidence of facts rather than the facts themselves. The declaration, plea, replication, joinder of issue, evidence and judgment in the former suit are spread at large upon the record—a practice that was condemned by this court in the case of

Prentice v. Zanes, Administrator, 8 How., 470.

in which the record of another suit was incorporated at large into a special verdict. All this evidence cannot, we believe, be rejected as innocent surplusage. However plain the evidence for or against a given fact, this court, as it has often said, will not infer or find the fact. And when a special finding is made up partly of matters of fact, and partly of evidence, this court cannot say that the judgment is supported by the findings without looking into the evidence and determining whether there be not still other facts, fairly inferable from the evidence and sufficient to call for a different judgment.

To argue that no other fact than those found can be inferred

from the evidence reported, brings us at once to the discussion of questions of fact—a character of discussion that this court has uniformly declined to hear.

Second—There is no finding of facts upon which the court can say when the plaintiff's right of action accrued. The contract sued on is not found as a fact by the court. Undoubtedly, it might have been inferred from the pleadings, as the plaintiff averred, and the defendant did not deny, its execution.

Whether or not it was a sealed instrument, was not found as a fact—an ommission that might also have been supplied from the pleadings. But will this court supply the omission and make the inference for itself? If the case had been submitted to a jury for a special verdict, and the jury had returned a verdict in the exact form of the findings of the trial judge, could the trial court have pieced out the verdict from the date stated in the declaration? An averment of dates in a declaration is not a material part of the declaration (Woodward vs. Brown, 13 Pet. 1), and the parties having made up an issue of fact, the one averring and the other denying that the right of action accrued more than seven years before suit, the trial judge should, on the whole evidence, have found the facts to enable the court to determine that question. But, assuming that this court will look to the declaration and exhibits, it is clear that they called necessarily for a finding of facts, other than those that were found, to enable the court to determine the date of the accrual of the cause of action. For, assuming that this court will take the averments of the declaration—dates and all—as absolutely true against the plaintiff, and will treat those averments as if incorporated into the special findings, still the plaintiff would not, on the completion of the work, have had a present money demand against the defendant. His right would have been to demand, not money but bonds. If he had sued at any time before January 1st, 1876, (except for the installments of interest) the defendant could have defeated the suit by showing a tender of bonds of the kind stipulated for; or rather, it would have been an essential part of the plaintiff's case to aver and prove

a demand for the bonds and a refusal to deliver them. Without such demand and refusal, no right of action existed until the expiration of the time of credit allowed by the contract; and even with it, a right of action wholly different in form and essential characteristics, and possibly different in its results, would have accrued to him.

The fourth proposition of our brief involves the question whether the plaintiff succeeded in bringing himself within the saving clause of section 2163 of the Mississippi Code of 1871. By that section it is enacted:

"If, in any action duly commenced within the time allowed, the writ shall be abated or the action otherwise avoided or defeated by the death or marriage of any party thereto, or *for any matter of form*, * * * the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit."

In the court below it was unquestionably assumed (from the declaration or otherwise) that more than seven years from the accrual of the cause of action had elapsed before the bringing of the present suit; and that the case must turn on the question whether the plaintiff had brought himself within the saving clause of the section above quoted. It was undoubtedly assumed also that the former suit was "duly commenced within the time allowed." It was found that this suit was brought within one year after the determination of the original suit; and the case was made to turn on the one question whether that original suit had been disposed of "for matter of form" only.

It was found by the trial judge that the original suit was determined against the plaintiff on the ground that he had an equitable but not a legal title to the cause of action sued on. The plaintiff, instead of suing in his own name should have sued in the name of Thos. Boyle, for his use; and for that defect alone his suit was dismissed. Did the court below correctly hold that this was not a dismissal for matter of form only, and did not bring the case within the saving clause of section 2163? That section has been frequently before the

Supreme Court of Mississippi, but we do not find any decision directly applicable to the facts of this case.

In the case of the *M. & C. R. R. Co. vs. Orr*, 52 *Miss.*, 541–545, that court said: "This expression 'for any matter of form' relates to technical defects in the form of action, or pleadings, or proofs, or to variances between the one and the other."

This section had its origin in the act of 21 Jac. 1, ch. 16, sec. 4; and, under different forms of phraseology, has been enacted in most—probably all—of the American States.

The statute of Massachusetts, so far as the question here under discussion is concerned, is identical with that of Mississippi, one of the saving clauses of each being where the first suit was defeated "for any matter of form."

In Coffin vs. Cottle, 16 Pick. 383, the Supreme Court of Massachusetts said that the statute meant to declare that "where the plaintiff has been defeated by some matter *not affecting the merits, some defect or informality which he can remedy or avoid by a new process*, the statute shall not prevent him from so doing, provided he follows it promptly by a suit within a year." The statute was declared to be remedial, and one that ought to be liberally construed to carry out the intent of the legislature: that the bar of the statute was intended to be complete only when the creditor "permitted his debt to remain a certain length of time without any *attempt* to enforce it, or to revive and perpetuate the evidence of it. * * * If the creditor resorts to *legal diligence* to recover his debt within the time limited," the bar was not intended to operate. And where suit had been brought and judgment recovered against an administrator, whose appointment was afterwards adjudged an absolute nullity, and a new suit brought within a year, it was held that the case was within the saving clause of the statute.

In *Woods vs. Houghton*, 1 *Gray* 580, the same clause was held to embrace the case of a trustee process brought in the wrong county, and dismissed for want of jurisdiction, the court saying that "the words used in the statutes declaring the cases in which a second action may be maintained, after a fail-

ure of the first, have always been construed favorably for the plaintiff, and never have been held to have a technical meaning."

In *Caldwell vs. Harding*, 1 *Lowell* 326, the same clause of the Massachusetts statute was held to save the bar in a case where a suit was brought in time against a Massachusetts administrator in the Federal Court of New York, and dismissed upon the ground that the administrator could only be sued in the forum of his appointment.

Other cases cited in our brief illustrate and enforce the proposition that this clause of the statute was intended to save the rights of a creditor who diligently attempted to enforce them by legal proceedings, and was defeated for any matter not concluding the right of action; that the statute was intended to prescribe a rule of diligence, and that a suit within the time allowed repelled the presumption of a want of diligence.

S. P. WALKER,

Attorney for Plaintiff in Error.

104-268

In the Supreme Court of the United States.

PATRICK G. MEATH,
Plaintiff in Error,
vs.
THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS,
Defendant in Error.

No. 102.
Oct. Term, 1883.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

Brief on Behalf of Defendant in Error.

STATEMENT OF FACTS.

The plaintiff filed his declaration on the 21st December, 1878. The allegations of it are as follows:

On the 13th August, 1869, the plaintiff and Martin Keary covenanted with the Board of Levee Commissioners for the counties of Bolivar, Washington and Issaquena, to do certain work (18, 19). The board covenanted on performance of the work to deliver to the contractors its coupon bonds, maturing January 1st, 1876 (31, 32, 37). On or about the first day of every month, during the progress of the work, an estimate was to be made of the relative value of the work done, to be judged of by the chief engineer, and upon his certificate of the amount, audited by the president and countersigned by the secretary, being presented to the treasurer, four-fifths of the amount of the said estimate was to be delivered to the contractors in bonds (32).

Before the work began Keary withdrew from the contract, with the consent of the defendant, and sold his interest in the covenant to the plaintiff; thereafter the plaintiff undertook to carry out and complete the said covenant. The defendant had notice of this and assented to it (9). The plaintiff, between the 9th of September, 1869, and the 25th of February, 1871, did a large amount of the work mentioned in the covenant, and the defendant owes him $65,482 in respect of it (6).

It is nowhere alleged that the engineer certified the work, or that his certificate was audited by the president or countersigned by the secretary, or presented to the treasurer. It is averred that the said work was accepted by the defendant (12).

It is further alleged in the declaration that on the 10th January, 1870, the defendant ordered all further work on the Cammack levee to be suspended, and notified and coerced the plaintiff to desist from further work thereon until further order, and forbade and prohibited the plaintiff from completing said work on said levee until further order, and failed and refused to lay off any further work on said levee so as to enable the plaintiff to finish the said levee as he had undertaken to do. The plaintiff was ready and willing to go on with the work (8). No other breaches are alleged.

The plaintiff was adjudged a bankrupt on the 17th February, 1875. On the 23d September, 1876, his assignee in bankruptcy assigned this claim to Thomas Boyle for $500. On January 16, 1877, Boyle, who purchased it for the plaintiff, gave him a writing declaring the same, and on the 28th January, 1878, assigned it to him (10, 11).

On the 26th of March, 1877, the plaintiff brought suit on this claim, but on the 5th of April, 1878, his action was avoided or defeated on the ground that Boyle was the proper person to sue (9, 10).

To the declaration the plaintiff pleaded—

1. A plea in the nature of the general issue (46, 47, 48).

2. Performance as to all the work done (48).

3. Negligence of the plaintiff by which the defendant suffered heavy loss (49, 50).

4. Voluntary abandonment of his contract by the plaintiff from inability to perform it (50, 51).

5. Want of power in the defendant corporation to issue the bonds (51. 52).

6. The Statute of Limitations, viz., that the action did not accrue within seven years (53).

7. Denies that the former suit was defeated for matter of form, and pleads the Statute of Limitations (53, 54, 55, 56).

8. Res judicata by virtue of the judgment of April 5, 1878, in the former suit (57, 58).

The only pleas for consideration on the writ of error are the 6th and 7th.

Issue was joined on these pleas (67).

The parties waived in writing a jury, and agreed to go to trial on the 6th and 7th pleas, viz., those relating to the Statute of Limitations (64, 65).

The court made a *general finding* of the issues joined on the 6th and 7th pleas in favor of the defendant (68).

"The court having heard the evidence upon the 6th and 7th pleas of defendant, and the replications thereto, and joinders in issue, and arguments of counsel, finds said issues in favor of defendant." (68.)

On this finding judgment was entered in favor of the defendant (68).

In addition to the general finding, the court found specially, as follows:

On the 26th March, 1877, the plaintiff brought an action against the defendant, on the contract set out in and exhibited with the declaration in this cause (68): the defendant pleaded a transfer of all interest in said contract to an assignee in bankruptcy, under the bankrupt law (77): to said plea the plaintiff replied that his assignee in bankruptcy had sold the said contract to one Boyle, who purchased it for the plaintiff, and assigned it to him on the — day of January, 1877 (78): issue was joined on this replication (79): this issue was submitted to the court for trial (85): on the trial it was shown that the assignment of Boyle to Meath was made on the 28th January, 1878 (85, 39, 40): on this state of facts the court found that the plaintiff did not have the legal title to the claim sued when the action was commenced (85): and judgment therein was rendered in that suit for the defendant (85).

The court also found that the present action was brought on the 21st December, 1878 (86): and that the cause of action arose on the 1st April, 1871 (89).

ARGUMENT.

It is submitted:

I. That the court did not err in rendering judgment for the defendant on the findings on the plea of the statute of limitations.

II. That by the declaration it appears that the covenant sued on was extinguished by the substitution of a new contract.

III. That it appears by the declaration that a necessary party has not been joined.

IV. That it appears by the declaration that the plaintiff has no right of action vested in him.

Points.

I. The judgment being rendered on a *general* finding must be affirmed.

II. The special finding is silent as to the existence of any contract and the judgment thereon was properly for the defendant.

III. The special finding makes out the plea of the Statute of Limitations and the judgment thereon was properly for the defendant.

IV. It appears by the declaration that the covenant sued on was extinguished by the substitution of a new contract.

V. It appears by the declaration that a necessary party has not been joined.

VI It appears by the declaration that the plaintiff has no right of action vested in him.

Argument.

I. The finding having been general the case is not reviewable by this court.

The rule is to sustain the judgment if it can be rested on anything appearing in the record. In this case there was a general finding, and the defendant should have the benefit of it.

II. There is no special finding of the evidence of a contract, and the judgment was properly for the defendant.

The court made no reference in the special finding to the existence of a contract. The contract is set out in the declaration, and the plea of the statute confesses it,

but: 1st. The confession is only evidence, and there must be a verdict or finding by the court to establish the fact confessed: 2nd. The confession is only for the purpose of the plea, and if that is overruled, there is no confession.

III. The plea of the Statute of Limitations is made out. The statutes to be considered are the following:

"ART. 6. All actions of debt or covenant founded upon any bond, obligation or contract, under seal or upon the award of arbitrators, shall be commenced within seven (7) years next after the cause of such action accrued, and not after."

Revised Code of Mississippi, 1857, p. 400.

"The several periods of limitation prescribed by this chapter, shall commence from the date when it shall take effect: but the same shall not apply to any action commenced, nor to any cases where the right of action or of entry shall have accrued before that time, but the same shall be subject to the laws now in force; but this law may be pleaded in any case where a bar has accrued under the provisions thereof."

Miss. Code, 1871, § 2172.

"That this act shall take effect and be in force from and after the first day of October, A. D. 1871."

Miss. Code, 1871, § 2938.

"If in any action duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated by the death or marriage of any party thereto, or for any matter of form, or if, after the verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal or writ of error, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or

after the reversal of the judgment therein; and if the cause of action does, by law, survive, his executor or administrator may, in case of his death, commence such new action within the said one year."

Miss. Code, 1871, § 2163.

"That all actions of debt or covenant founded upon any bond, obligation or contract under seal, or upon the award of arbitrators, shall be commenced within seven years next after the cause of such action accrued, and not after.

"SEC. 2. That this act take effect upon its passage."

Stats. of Miss., 1873, approved April 19, 1873.

It thus appears that between 1857 and the 1st October, 1871, the period of limitation as to sealed instruments was seven years, by virtue of the act of 1857. After October, 1871, that act was still in force, by virtue of sec. 2172 of the Code of 1871.

It is said that Furlong *vs.* The State is in conflict with this view.

That case is not on the present point at all. It decides: 1st. That the act of April 19th, 1873, applies to then existing contracts; 2nd. That the exceptions in the code of 1871 apply to the act of 1873.

The court says expressly that the cause of action was treated as arising between the date of the code of October 1st, 1871, and that of the act of April 19th, 1873. It seems that for causes of actions *accruing* in that period, there was no bar until the act of 1873. But the finding is that this cause of action arose on April 1st, 1871.

The cause of action in the present suit having accrued on the 1st April, 1871, and this action having been brought on the 21st December, 1878, it was brought too late.

But it is contended—

That this cause of action accrued on January 1st, 1876.

The answer to this is that the court has found the 1st April, 1871, as the date of the accrual of the action.

If the contract can be looked at for the purpose of determining the date at which the right of action accrued, the contention of the plaintiff in error will be plainly seen to be wrong. The contract was one to deliver bonds, not to pay money, and the right to receive the bonds was to accrue at the latest on the 1st April, 1871. It appears on the face of the declaration that the breaches of the contract occurred in fact much earlier, viz.. about January 10th, 1870.

It is argued that there is no finding of the contract, and therefore no means of determining when the cause of action arose.

The answer to this is that the court found that the cause of action arose on April 1st, 1871, and was not bound to find also the evidence on which it reached that conclusion.

It is said that the plaintiff brought a former action, which was defeated for matter of form, and that this action having been brought within one year thereof, is within the exception of § 2163.

It is doubtful whether on the pleadings the plaintiff can have the benefit of the exception. The defendant, in his sixth plea, set up the bar of the statute ; issue was joined on that plea, and the finding on it is in favor of the defendant. The plaintiff, if he wanted the benefit of the exception, should have replied it to the sixth plea, which he has not done. The matter of such a replication is in the declaration, but the defendant was not bound to notice it, because it was badly pleaded.

If this issue is properly before the court, the defendant in error insists that the former action was not defeated for form, but for substance.

The phrase " matter of form " has a technical and sufficiently definite meaning. It indicates some fact con-

nected with the statement of a party's right. It is used in contradistinction to matter of substance which is some fact on which the right itself depends. A defect for matter of substance is a defect in respect of substantive law; for matter of form is in respect of what has been called adjective law. It is a defect in the proceedings in a cause.

A convenient test of defective matter of form is that it must be taken advantage of by special demurrer.

"A demurrer may be for insufficiency, either in substance or form: that is, it may be either on the ground that the case shown by the opposite party is *essentially insufficient*, or on the ground that it is stated in an inartificial manner." "A special demurrer is necessary where it turns on matter of form only, that is, where, notwithstanding such objection, enough appears to entitle the opposite party to a judgment so far as relates to the merits of the case."

Stephens on Pleading, 140.

From these citations it appears that defective matter of form is inartificial statement. Misnomer, variance between the writ and declaration, suing in the wrong action, misjoinder of actions, duplicity in pleading, are some of the defects in matter of form.

The plaintiff's former action was brought on a contract. The defendant pleaded that before action brought the plaintiff's right under the contract had been transferred to his assignee in bankruptcy. The plaintiff replied an assignment by his assignee in bankruptcy to himself. Issue was joined on this replication, and the issue was found in favor of the defendant. 86.

It thus appears that the plaintiff was defeated because he had at the time of action brought, no cause of action vested in him. No defect appeared in the statement of his case; but on the trial it appeared that the right which he alleged was not in him. His action was plainly de-

feated on a question involving the merits or in other words for matter of substance.

It can make no difference as to the character of the former dismissal, that the plaintiff after action brought acquired title to the cause of action.

When the plaintiff brought his former action, viz., March 26, 1877, there was some other person at that time vested with the right which he, the plaintiff, sued on. It does not appear whether the assignee in bankruptcy or Boyle was that person. It is enough to say that his predecessor in title might then have sued on it. If such action had been defeated for matter of form, it would have saved the plaintiff's present action, because there would have been privity of interest between the actor in the former suit and the plaintiff. But the plaintiff, when he sued formerly, was a stranger to the title. If suit by a mere stranger to the title can save the present action, then there would be not one suit but many, which would have that effect.

The precise point under discussion has not been decided by the courts of Mississippi, but their decisions are in harmony with the contention of the defendant.

"The provision (of §2,163) which relates to abatement for form applies to technical defects in the form of the action or pleadings or proof, or to variance between one and the other." "A suit dismissed for want of security for costs is not within this section."

R. R. Co. *vs.* Orr, 52 Miss., 541.

The 14th section of the code of Mississippi, 1822 (p. 827), gave the right of bringing a new action within one year after a former action had abated: "*Held*, That party bringing a new suit must be privy in interest with the plaintiff in the original suit.

Ingraham *vs.* Regan, 23 Miss., 228.

It has been decided, under the statute of Georgia of

March 16, 1869, which provides that a plaintiff who has sued before the statutory bar attached, and whose suit has been dismissed, may sue again within six months from such dismissal; that a suit dismissed for want of jurisdiction is no suit at all, but a nullity, within the meaning of this act.

Gray *vs.* Hodge, 50 Ga., 262.

But it is alleged that the plaintiff had, at the time of the first action, an equitable right of action.

Even if this is so, the want of legal title was matter of substance in the court in which the plaintiff sued. It was none the less so because the plaintiff had an equity.

The benefit of section 2163 is confined to actions which abated or were defeated for matter of form. An action defeated because the party had only an equitable title is in neither of these categories.

The exact fact as to the claimant's equitable right does not appear clearly from the record.

The plaintiff has been guilty of laches. If he was the equitable owner of the claim in 1877, he would then have sued in the name of Boyle, and his action, so brought, would have been good in substance as well as in form.

The case of Cattle *vs.* Coffin, is not in point. In the other two cases cited, the action relied on abated or was defeated for want of jurisdiction. In neither was there a judgment on the merits.

The plaintiff slept on his rights from the 10th of January, 1870, or in one view, from the 1st April, 1871, until February 17, 1875. He did so, although the amount involved was large and his affairs were embarrassed. On the latter date he became a bankrupt. On the 23d of November, 1876, he purchased the claim for $500. He had ample time thereafter to bring a suit and his miscarriage is through his own fault.

IV. It appears from the pleadings that the contract on which he sued was satisfied and discharged by the substitution of a new one.

The plaintiff alleges in his declaration that the covenant of the 13th August, 1879, was abandoned before the work was begun, and a new contract substituted for it. He says in his declaration (9):

"And the plaintiff further says, that prior to the commencement of said work under the said covenant, the said Keary withdrew therefrom to the knowledge and with the consent of defendants, and sold his interest in and to the said covenant to plaintiff, and has no interest in this suit, and thereafter plaintiff undertook to carry out and complete the said covenant, of all of which defendants had notice, and to all of which they assented, plaintiff paying over to said Keary for his interest in said contract a large sum of money, to wit, the sum of $6,500, and all estimates for work done on said levees being issued to and in favor of plaintiff.

It thus appears from the plaintiff's statement that the original contract was satisfied and discharged, and a new one substituted in its place. But the suit is brought on the original contract. If the suit had been brought on the new contract, which was by parol, the defendant could have pleaded that it had not been brought within six years. The plaintiff cannot escape this provision of the statute by resorting to the old contract.

In this case the new contract was made before breach, and the case is not one of accord and satisfaction, which occurs only after breach, but of extinguishment by the substitution of a new contract. The doctrine of extinguishment by substitution is stated clearly in Anson on Contracts, p. 250, Am. ed.

It appears from the declaration that the original contract was between Meath & Keary jointly and the defend-

ant. If the original contract subsists, Keary or his representative should be joined as a party plaintiff.

V. Keary could not assign his rights in the contract. The contract was one, not for the payment of money, but for the delivery of bonds on the performance of certain things by Meath and Keary. The assignment was made before performance. Any assignment of such a contract, before or after performance by one party, is unknown to the common law, and is void. The right remains in Keary, notwithstanding the attempt to assign, and his personal representative is a necessary party.

The bankruptcy of Meath did not affect Keary's rights at law, and he and Meath's assignee were jointly vested with the rights under the covenant.

Bump on Bankruptcy, 576, 6th ed.
Halsey *vs.* Norton, 45 Miss., 703.

In Gates *vs.* Goodloe, 101 U. S., p. 612, it was held that an assignee in bankruptcy of two partners, and the other solvent party, properly brought the writ of error.

Non-joinder of parties may be taken advantage of on writ of error.

Chitty on Pleadings, 12.

VI. It appears from the declaration that the right of action on the contract is vested in Boyle, and not in the plaintiff.

The record shows that the plaintiff's assignee in bankruptcy assigned to Boyle. That assignment was good under the bankrupt law. Boyle could not assign a claim for contingent damages.

JAMES LOWNDES,
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